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N. 3019

No. 15343

United States
Court of Appeals
for the Ninth Circuit

MIKE H. KOSTELAC and MARYLAND CASUALTY COMPANY, a Corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

UNITED STATES OF AMERICA,

Appellant,

vs.

MIKE H. KOSTELAC and MARYLAND CASUALTY COMPANY, a Corporation,

Appellees.

Transcript of Record

Appeals from the United States District Court for the Western District of Washington. Southern Division.

FILE

FEB - 8 1957

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—2-8-57

PAUL P. O'BRIEN, C

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorneys for Defendants.

United States District Court, Western District of Washington, Southern Division

No. 1581

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MIKE H. KOSTELAC and MARYLAND CASUALTY COMPANY, a Corporation,

Defendants.

COMPLAINT

The United States of America, plaintiff, by J. Charles Dennis, United States Attorney for the Western District of Washington, acting under the direction and authority of the Attorney General of the United States and for cause of action against the above-named defendants, alleges:

I.

That the plaintiff is a corporation sovereign, and jurisdiction exists by reason of Title 28, U. S. Code, Section 1345.

II.

That the defendant, Mike H. Kostelac, is not presently within this district, but plaintiff is advised and therefore alleges, that said defendant has filed with local counsel a written consent authorizing said counsel to accept service on said defendant's behalf and submit to the jurisdiction of this court.

III.

That at all of the times herein mentioned, the defendant Maryland Casualty Company, has been, and now is, a corporation organized and existing under and by virtue of the laws of the State of Maryland, having a place of business in Tacoma, Washington, and authorized to do business in the State of Washington; and has designated a person residing and who now resides in Seattle, Washington, in said Western District of Washington, upon whom process in civil actions against said corporation may be served as the representative of said corporation.

IV.

That on or about June 29, 1946, the defendant, Mike H. Kostelac, entered into a contract in writing with the United States of America, plaintiff herein, said contract being designated, "Contract No. W-45-016 (S. C.-IX) S-497," and consisting of said defendant's bid dated June 26, 1946, and the plaintiff's acceptance as to item No. 2 thereof, dated June 29, 1946, under the terms of which contract the said defendant, Mike H. Kostelac, agreed to collect and remove daily for a five-year period commencing July 1, 1946, unless sooner terminated at the convenience of the Government upon thirty days' notice in writing, all garbage suitable for animal consumption, excluding grease, bones and raw meat trimmings, accumulating at all messes at Fort Lewis South, Fort Lewis North, Fort Lewis Northeast, Section 5 Hospital, and Mount Rainier Ordnance Depot, averaging 40,000 men, estimated at .04 pounds per man per day, and to pay therefor on a

per man per month basis, at the sliding scale of prices provided in the contract, in the total estimated amount of $200,000, payment to be made on or before the 10th day of each month for the garbage removed during the preceding month.

V.

That pursuant to provision No. 1 of the General Conditions of said contract, the said defendant, Mike H. Kostelac, executed and furnished the United States of America a bid bond dated June 26, 1946, in the penal sum of $40,000, conditioned that the said defendant enter into a written contract with the Government, in accordance with the bid as accepted, and give bond with good and sufficient surety for the faithful performance and proper fulfillment of such contract: that the defendant, Maryland Casualty Company, a corporation, was the surety upon said bond. That said surety bond was further conditioned for the payment to the Government of the difference between the amount specified in defendant's bid and the amount for which the Government might procure the required work and/or supplies in case the said defendant, Mike H. Kostelac, failed to enter into such contract and give such bond within the time specified.

VI.

That said defendant, Mike H. Kostelac, collected and removed kitchen waste for the months from July 1, 1946, through to December 15, 1946, and there became due and owing on account thereof

under said contract to the plaintiff for such period the sum of $24,261.16; that said defendant failed to make payment for any garbage collected under said contract, and by reason thereof was declared in default and notified by letter dated November 27, 1946, that he would be given the opportunity of remedying his default at any time prior to December 13, 1946, and that upon failure so to do, the said kitchen waste would be sold to the highest bidder and the Government would proceed to collect the money due and damages that might accrue on sale from a return less than specified in defendant's contract.

VII.

That by reason of the failure and refusal of defendant, Mike H. Kostelac, to perform his said contract to collect and remove kitchen waste, as aforesaid, the plaintiff was obliged to, and did enter into contract No. W 45-016 (A.A.-VI) S-261, dated December 13, 1946, with John DeBoer, Route 2, Box 370, Olympia, Washington, the highest bidder under readvertisement, for the services required by said defendant's contract, to be performed under the same conditions, during the period beginning December 16, 1946, and ending June 30, 1951, with payment on the same basis, at the sliding rate provided for therein.

VIII.

That the Comptroller General of the United States of America has audited the accounts between the plaintiff and defendants and has certified that there

is now due and owing to the United States of America, due to said defendant's default under his contract, the aforesaid sum of $24,261.16 for garbage collected by said defendant during the period July 1, 1946, through December 15, 1946, and $80,-102.24, representing the difference in revenue obtained by the Government on resale of the garbage to the said replacing contractor, John DeBoer, during the period December 16, 1946, to June 30, 1951, making a total sum of $104,363.40 now due and owing to plaintiff since July 1, 1951.

IX.

That the aforesaid contract, replacing contract and bid bond are of public record on file with the General Accounting Office of the United States, and are known and designated by their respective numbers hereinbefore set forth.

X.

That no part of such total amount owed has been paid by said defendant, Mike H. Kostelac, or defendant, Maryland Casualty Company, and there is still due and owing to plaintiff on said contract the sum of $104,363.40, which amount has been due and owing to plaintiff since July 1, 1951.

That written notice of the amount thus owing the plaintiff by defendant, Mike H. Kostelac, and the nature of the claim was given to said defendant, Mike H. Kostelac and defendant, Maryland Casualty Company, on or about January 16, 1952; that not-

withstanding repeated demands made upon the defendants, they have wholly failed, refused and neglected to pay said sum or any part thereof, and the said defendant, Mike H. Kostelac, is now indebted to the plaintiff in the full sum of $104,363.40, and interest thereon at the legal rate from July 1, 1951, and the defendant Maryland Casualty Company is now indebted to the plaintiff in the full sum of $40,000, the amount of its liability herein, with interest thereon at the legal rate from July 1, 1951.

Wherefore, plaintiff prays:

1. That it have and recover judgment against the defendant, Mike H. Kostelac, in the full sum of $104,363.40, together with interest thereon at the legal rate from July 1, 1951.

2. That it have and recover judgment against the defendant, Maryland Casualty Company in the sum of $40,000, together with interest thereon at the legal rate from July 1, 1951.

3. That it have and recover its costs herein to be taxed.

4. That plaintiff have such other and further relief as to the Court may seem just.

/s/ J. CHARLES DENNIS,
United States Attorney;

/s/ GUY A. B. DOVELL,
Assistant U. S. Attorney.

[Endorsed]: Filed May 22, 1952.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS AND COUNTERCLAIM FOR RESCISSION

Come now the defendants herein, and for answer to the complaint of the plaintiff herein, state and allege as follows:

1. Defendants admit the facts alleged in paragraph I of said complaint.

2. With respect to the averments in paragraph II, defendants state that defendant Kostelac has entered his appearance herein.

3. Defendants admit the averments of paragraph III, and state that defendant Maryland Casualty Company has entered its appearance herein.

4. Defendants admit the execution of Contract No. W-45-016 (S.C.-IX) S-497, referred to in Paragraph IV of the complaint herein, and defendants do hereby incorporate by reference in this pleading all the provisions of said contract, a copy of which is attached to this Answer, marked Exhibit "A," said Exhibit consisting of seven pages including the reverse sides of two pages thereof.

5. Defendants admit the execution by defendant Kostelac and defendant Maryland Casualty Company of a Bid Bond, as alleged in Paragraph V of the complaint herein, and defendants do hereby incorporate by reference all of the terms and provisions of said Bid Bond, attached hereto marked

Exhibit "B," as fully as if said Bid Bond were set out at length herein. Defendants state that plaintiff has set forth in Paragraph V of its complaint the relevant provisions of said Bond, except the following: "if the latter amount be in excess of the former," which words appear in the last four lines of the last paragraph of the body of said Bid Bond; and defendants state that the "latter amount" (being the amount of the DeBoer Contract, as alleged in Paragraph VII, et seq., of the Complaint) was not in excess of the "former" (the amount of the Kostelac contract) which said facts are admitted by plaintiff in Paragraph VIII hereof; and that by reason thereof, there is no obligation on the part of defendant Kostelac or defendant Maryland Casualty Company under said Bond.

6. With respect to the averments in Paragraph VI of the complaint, defendants admit that defendant Kostelac removed kitchen waste from July 1, 1946, to December 15, 1946; and that said defendant refused to pay the price set forth in the aforesaid contract, Exhibit "A," by reason of the mistake in the price therein, as set out hereinafter, but defendants state that said defendant Kostelac offered at all times to pay the reasonable value thereof, but plaintiff refused such offer; and defendants deny that plaintiff is entitled to the payment of $24,261.16 therefor; that any claim therefor is further barred by the Statute of Limitation; and defendants state that defendant Kostelac at all times was ready, willing and able to collect all of said garbage and

kitchen waste, and did collect such garbage and waste until he was prevented therefrom by the plaintiff on or about December 15, 1946; and defendants require strict proof of all other allegations in said Paragraph VI of plaintiff's complaint.

7. In regard to Paragraph VII of the Complaint, defendants admit that plaintiff received payments from one DeBoer for the said garbage, but defendants do not have direct knowledge as to the details thereof, as alleged in said Paragraph VII, and require strict proof thereof by plaintiff.

8. In respect to Paragraph VIII of said Complaint, defendants admit that the Comptroller General of the United States issued to defendant Kostelac a purported statement totalling $104,363.40, but defendants have no knowledge as to the allegation that said Comptroller General has audited said account, and deny that any such audit would be binding upon these defendants; and defendants deny that defendants are liable for any of said amount, and deny that the difference in revenue to the Government on resale of the garbage is a measure of or basis for alleged damages herein.

9. The facts in Paragraph IX do not require an answer by defendants.

10. For their answer to Paragraph X of the complaint, defendants admit that demands have been made upon them by the Government, and admit that no part of the sum of $104,363.40 has been paid to the plaintiff, but defendants deny that any of said

sum is due plaintiff, or any interest thereon; and defendant Maryland Casualty Company denies that plaintiff is entitled to the sum of $40,000.00 plus interest, or any portion thereof.

11. Further answering, defendants state that the aforesaid contract, Exhibit "A," was entered into by mutual mistake of the parties, and that there was no meeting of the minds because both the plaintiff and defendant Kostelac were of the belief, and under the impression that the amount of garbage examined by defendant Kostelac at plaintiff's request at Ft. Lewis in making his estimate and his bid for contract No. W-45-016 (S.C.-IX) S-497 was a one-day accumulation of garbage, whereas in fact it was an accumulation of more than one day, and therefore the average actual accumulation of garbage at Ft. Lewis was less than the parties had contemplated; that the amount of such accumulation was the basis for the price in such contract, and such price was therefore erroneous by mutual mistake of the parties; and that said contract is therefore of no legal effect.

12. Further answering, defendant state that said contract, Exhibit "A," is unenforceable by plaintiff against defendants for the further reason that the prices set out therein to be paid by defendant Kostelac for garbage on Continuation Sheet (2) were specifically based upon prices (paragraph a) to be "published * * * at the Seattle Stock Yard Market located at Seattle, Washington," whereas in fact there was not at the time said contract was

entered into, and never has been since said time, any publication at said alleged market, nor has there been any individual Seattle Stock Yard Market located at Seattle, Washington.

13. Defendants state that plaintiff is not entitled to recover herein for the further reason that plaintiff, after the execution of the aforesaid contract, Exhibit "A," disenabled itself from performing said contract; that Continuation Sheet (1) of Exhibit "A" sets forth the approximate average number of men at Ft. Lewis, Washington, upon which the bid was based, as 40,000; that the actual number of men at Ft. Lewis never at any time during said contract period approximated such figure of 40,000 men; that, on the contrary, the number of men at Ft. Lewis over said period, as shown in the official statement of the Comptroller General relied upon in Paragraph VIII of the Complaint by plaintiff, is in the amount set forth in Exhibit "C" attached hereto; that the number of men at said Ft. Lewis at times was only slightly in excess of 5,000 men, and that for one of the yearly periods under the contract the average was approximately 7,000 or 8,000 men; that defendant Kostelac relied upon the amount of garbage that would be obtained from approximately 40,000 men, in entering into said contract, and that said failure and inability of plaintiff was highly detrimental to defendant Kostelac, and invalidated said contract.

14. Defendants deny that defendant Kostelac refused at any time to pick up the garbage and trash,

in accordance with the provisions of said contract, Exhibit "A," and deny that plaintiff had the right to attempt to terminate said contract; and defendants state that the purported termination of said contract by plaintiff cannot be the basis for this action against defendants.

15. Defendants further state that the aforesaid Contract No. W-45-016 (S.C.-1X) S-497 is unenforceable by plaintiff for the further reason that said contract is vague and indefinite; that it lacks mutuality, and may be terminated at the whim of plaintiff.

16. Defendants further state that said contract constituted a rebid of previous negotiations; that neither party to said contract intended it to become operative unless one DeBoer bid thereon; that said DeBoer did not rebid, and such contract is therefore of no effect.

Counterclaim by Defendants for Rescission of Contract

Defendants, for their counterclaim for rescission of said contract, allege and state as follows:

1. That defendant Kostelac, prior to making his bid, forming a part of the contract set out in Exhibit "A," upon the written request of plaintiff as set out in General Provision No. 5, as affirmed in Paragraph 3 of the Invitation to Bid in said Exhibit "A," setting June 21, to June 26, 1946, between eight o'clock a.m. and 4:30 p.m. daily for

inspection, and also upon the verbal request of plaintiff's agents, went upon the premises of Ft. Lewis personally, on more than one occasion, and inspected large numbers of actual garbage containers at the Messhalls, prior to said containers being emptied by the person then under contract with plaintiff to remove such garbage; that defendant believed, and actually assumed, from verbal statements by plaintiff's officers, and by reason of the terms of the garbage-removal contract then in effect of which said defendant had knowledge, and which required daily pickup, that any garbage in such containers represented only one day's accumulation of garbage; that upon the basis of said thorough inspections personally made by said defendant and the facts actually observed on said inspections, said defendant assumed and determined that the average accumulation of garbage at said time and place equalled one pound of garbage per man per day; that defendant Kostelac was specifically directed by the Contracting Officer to disregard, and did therefore disregard, the reference in the bid to .04 lbs. waste per man per day; that by reason of the fact that the conditions then existing appeared to be, and were in fact, representative of the conditions to be encountered over the period of said contract, defendant Kostelac reasonably relied upon his said findings in determining the price he would and did in fact bid under said contract, Exhibit "A"; that such inspection was made by said defendant by reason of the fact that any variation in average quantities of accumulated garbage would affect the

price to be paid by said defendant, since the proposed bid was not based upon the amount of garbage to be removed, but in accordance with the number of men at Ft. Lewis; that, contrary to the belief and understanding of defendant Kostelac, and contrary to the belief and understanding of the officers in charge of said contract as expressed to defendant Kostelac, the actual containers examined on said occasions by defendant Kostelac did not in fact contain only a one-day accumulation of garbage, but in fact contained a two-day accumulation of garbage; that by reason of such error and mistake, defendant Kostelac prepared his bid, attached hereto as a portion of Exhibit "A," in an amount averaging approximately twice the amount that said defendant would have bid if such mistake had not been made in said quantity of garbage; that defendant Kostelac did not learn of said error until the third day of his operation under said contract attached hereto as Exhibit "A," at which time the daily accumulations of garbage were found by him to be approximately one-half the amount estimated by defendant Kostelac; that immediately upon learning of such mistake, defendant Kostelac notified plaintiff's Contracting Officer, Major P. P. Maiorano, and in addition, a few days therafter, through his attorney, gave written notice to said Contracting Officer of the mistake; and said defendant continued to give notice thereafter not only to said Contracting Officer, but to other Government personnel in a supervisory capacity at the Service Command, at Army Headquarters for said Pacific area, and in

Washington, D. C., including numerous long trips made by defendant; that defendant Kostelac at all times and repeatedly offered to pay to the Government the reasonable value of the garbage being picked up under said contract, and to pay the price that would have been bid by said defendant in the absence of said mistake; and that said defendant constantly and continually requested to be relieved by plaintiff from said mistake, and from the consequences thereof; but that plaintiff, through its officers and agents, delayed, procrastinated and failed, refused and neglected to take action to relieve defendant of said consequences, and delayed giving any final decision to defendant; that during said period said defendant Kostelac continued to carry away the said garbage from Ft. Lewis, in order to avoid unsanitary conditions, even though said defendant was required to dispose of most of said garbage at a complete loss to said defendant; that plaintiff's refusal to release said defendant from the consequences of said mistake was placed by plaintiff on the ground that defendant was bound to plaintiff on a legal technicality

2. Defendants state that said mistake referred to above, by reason of the facts set out above, constituted a mutual mistake of the parties and that defendants are entitled to have said contract, attached hereto as Exhibit "A," rescinded, cancelled and held for naught by this Court.

3. Defendants state that in the event said mistake was not a mutual mistake of the parties, but

was a mistake of defendant Kostelac alone, then defendants are nevertheless entitled to a recission of said contract, attached hereto as Exhibit "A," in that said mistake was made by said defendant in good faith, without negligence, and said mistake was caused, at least in part, by the actions of the officers of plaintiff in causing or contributing to defendant's being misled as to the amount of said garbage; that plaintiff will suffer no loss of said contract is rescinded, except that plaintiff will be prevented from exacting an unfair, unintended and unconscionable price from defendants, such price being approximately twice the value of such garbage.

Wherefore, defendants pray that this Court enter an order that the aforesaid contract, attached hereto as Exhibit "A," be cancelled, rescinded, and held for naught, and that no liability has accrued against defendants by reason of said contract; and that this Court grant to defendants any other or further relief as to this Court may seem meet and proper in the premises.

TENNEY & DAHMAN,

By /s/ E. H. TENNEY, JR.:

EISENHOWER, HUNTER,
RAMSDELL & DUNCAN,

By /s/ CHAS. D. HUNTER, JR.,
Attorneys for Defendants.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed February 16, 1955.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Come now the defendants herein and move this Court for a Summary Judgment in favor of said defendants, and for a Finding by this Court that said defendants are not liable to plaintiff herein; and as their basis for such Motion, defendants state that the following facts are not the subject of a dispute herein, and there is no genuine issue as to the following material facts, and that defendants should be granted Summary Judgment herein on the basis of any one of such undisputed facts:

1. The contract in issue was entered into under mutual mistake of the parties as to a material fact.

Defendants state that the lack of any genuine issue of fact as to the above is shown in the verified Answer and Counterclaim of defendants herein and in the Affidavit for Summary Judgment attached hereto; and defendants state that the Contracting Officer, Major P. P. Maiorano, the sole representative of the plaintiff on said contract was acting under a mistaken view in that he had no knowledge that the garbage accumulated at Ft. Lewis at the time in question was of more than one day's duration, and said Contracting Officer has admitted such fact; that said Contracing Officer has further admitted that he had determined, after execution of said contract, that pick-ups of garbage at said time and place were not always on a daily basis, and has

admitted that such pick-ups at the time in question were probably on a two-day basis; and defendants state that they are informed that the said Contracting Officer has not at any time, in his reports or otherwise, and does not now dispute the fact that defendant Kostelac was misled by the amount of garbage in the containers examined by him as set out herein.

2. (In the alternative.) The contract was entered into by reason of a unilateral mistake by defendant Kostelac which under the law is a basis for rescission of said contract.

Defendants state that even if the facts relating to a mutual mistake of the parties should be in dispute (which is denied), it is shown by the verified Counterclaim and the Affidavit for Summary Judgment herein that there is no genuine issue of fact as to the existence of an excusable unilateral mistake made by defendant Kostelac; that in addition to the Contracting Officer's concession that defendant Kostelac made a mistake, there is no dispute that plaintiff's own Paragraph 3 of its Invitation to Bid (and General Provision 5 thereof) was the cause of this mistake by defendant Kostelac, and that such provisions invited the error; that there is no dispute that plaintiff had notice that defendant Kostelac bid twice too high, inasmuch as plaintiff has sued herein for an amount equal to approximately one-half of the contract price; that the ground for plaintiff's claim, as made by its Comptroller Gen-

eral, is the alleged view that unilateral mistakes cannot be corrected in contracts; and that there is no dispute that such error was unintentional by defendant Kostelac; that notice of the mistake was immediately given to plaintiff by defendant Kostelac; that an opportunity to remedy such mistake was afforded by defendant Kostelac immediately, without any delay; that plaintiff would suffer no loss as the result of rescission of this contract, except that it would not receive an inconscionable gain; and that the only dispute concerns the legal principles applicable to such facts.

3. Regardless of mistake, said contract is unenforceable for the further reason that the price is based upon market publications not in existence.

Defendants state that it appears from the pleading in Paragraph 12 of the Answer herein, together with Paragraph 4 of Affidavit of defendant Kostelac, that there is no dispute as to the fact that there was no market publication at Seattle, Washington, Stock Yard during the period of this contract; that this fact is admitted by plaintiff's own Department of Agriculture; and defendants state that by reason thereof, said contract is vague, uncertain and unenforceable and the price therein is based upon certain quotations not in existence.

4. Plaintiff has disenabled itself from performing this contract after the alleged breach by defendant Kostelac, in that the number of

men at Ft. Lewis fell far below the contract estimate on which the price was based.

Defendants state that it is shown from Exhibit "C," attached to the Answer of Defendants herein, verified by the Affidavit of defendant Kostelac that the plaintiff's performance failed after the alleged breach by defendant Kostelac, that plaintiff failed to furnish at Ft. Lewis even an approximation of the number of men originally contemplated, and failed to furnish more than a small fraction of the 40,000 rations estimated; and that by reason of such default, plaintiff is not entitled to recover herein.

5. Plaintiff has alleged no facts in Paragraph VI of the Complaint to justify its "Declaring said contract in Default" and suing for its breach.

Defendants state that the attached affidavit of defendant Kostelac and the verified Counterclaim of defendants herein, show that there is no failure by said defendant to perform, and therefore no ground for suit by plaintiff for breach of contract.

6. There is no liability under the Bid Bond because the amount of the DeBoer Contract is not in excess of the Kostelac Contract, as required by the specific wording of said bond.

Defendants state that they believe there is no dispute as to the wording of the Bid Bond attached to the Answer as Exhibit "C"; that as alleged in Paragraph 5 of defendants' Answer, plaintiffs have sued upon a penalty instrument and have failed to allege or prove the principal term and condition of said

bond; that on the contrary plaintiffs have specifically alleged facts in Paragraphs VII and VIII of the Complaint showing that the DeBoer relet contract was for a smaller amount than the Kostelac contract, and that the condition of said bond was not fulfilled.

7. There is no liability for damages under the other provisions of the contract.

Defendants state that the measure of damages for failure to perform by defendant Kostelac is set out in Paragraph 7 of the General Provisions of said contract attached to the Answer as Exhibit "A"; that there is no issue of fact as to the requirement of said General Provision No. 7; and that from the facts alleged by plaintiff in its petition, plaintiff has not incurred loss by defendant Kostelac's failure to remove said property under said General Provision 7, but that in fact plaintiff, under its allegation in Paragraph VIII of the Complaint, has received pay from one DeBoer under a relet contract with said DeBoer.

Wherefore, defendants pray for summary judgment herein dismissing plantiff's complaint at the cost of plaintiff.

TENNEY & DAHMAN,

By /s/ E. H. TENNEY, JR.;

EISENHOWER, HUNTER,
RAMSDELL & DUNCAN,

By /s/ CHAS. D. HUNTER, JR.,
Attorneys for Defendants.

[Title of District Court and Cause.]

AFFIDAVIT OF MIKE H. KOSTELAC

State of Missouri,
City of St. Louis—ss.

Mike H. Kostelac, being duly sworn upon his oath, states that he is a defendant in this cause, and that he makes this Affidavit as a part of the Motion of Defendants for Summary Judgment herein; that the following facts are true according to the personal knowledge of defendant, unless otherwise indicated herein:

1. Affiant adopts, affirms and incorporates herein his verified Counterclaim for Rescission herein, as fully as if said counterclaim and verification thereof were set out herein; and affiant further states that on the first occasion that he examined the garbage containers, as stated in said Counterclaim, he personally examined at least 40 garbage containers; and that he later examined numerous other containers; that he was told by the Contracting Officer to disregard, and he did disregard the statement in the contract as to the alleged .04 lbs. of waste per man, since it was not in fact correct, and was admitted by said Contracting Officer to be incorrect.

2. Affiant further states that Exhibit "A," attached to the Answer of Defendants, is a true and correct copy of contract No. W-45-016 (S.C.-IX) S-497, executed between the parties hereto; that affiant does not have the original of Exhibit "B,"

the Bid Bond herein, but that affiant's copy (Exhibit "B") is believed to be a true and correct copy of the original; that Exhibit "C" is a true excerpt from the account of the Comptroller General of the plaintiff, sent to defendant as a part of the demand of plaintiff for the payment of the sum of $104,363.40.

3. Affiant states that Major P. P. Maiorano, Contracting Officer and representative of the Government in connection with the aforesaid contract, never at any time to the knowledge of affiant questioned the fact that the mistake referred to herein, in connection with the bidding on said contract, was in fact made; that said representative of the Government, Major Maiorano, claimed that garbage pickup trucks were on the premises of Ft. Lewis each day, but did not contend that said trucks picked up garbage at all messhalls each day; that observations of affiant indicated that pick-ups were made from half of the messhalls one day, and the other half the next day, according to all evidence found by this affiant; that admissions were made to this affiant by agents of plaintiff after the execution of said contract, that a system of "complaints" had been in effect at Ft. Lewis for some time prior to said contract; that such "complaint" system was necessitated by the fact that garbage was not picked up at all locations every day; that the said Contracting Officer, Major Maiorano, admitted to affiant the existence of such a complaint system, caused by

reason of failure to pick up garbage at each location every day.

4. Affiant further states that he has examined letters from plaintiff's Department of Agriculture, Livestock Division, Rates & Registrations Section, admitting that there is no market news service conducted by said Department of Agriculture at Seattle, Washington, stating that the only reports published by said Department in the State of Washington are in Spokane, Washington, and admitting that such situation was true over the entire period of this contract, and at the time said contract was entered into.

5. Further affiant sayeth not.

/s/ MIKE H. KOSTELAC.

Subscribed and sworn to before me this 9th day of February, 1955.

[Seal] /s/ E. H. TENNEY, JR.,
Notary Public.

My Commission expires: September 10, 1958.

Receipt of Copy is Hereby Acknowledged this 16th Day of February, 1955.

/s/ GUY A. B. DOVELL,
Assistant U. S. Attorney.

[Endorsed]: Filed February 16, 1955.

[Title of District Court and Cause.]

INTERROGATORIES TO PLAINTIFF

Come now the defendants herein and submit the following Interrogatories to be answered by plaintiff herein, in accordance with Rule No. 33 of the Rules of Civil Procedure:

Please give the names and present addresses of all Mess Sergeants or other persons in charge who were on duty at any and all Messes at Ft. Lewis, Washington, at any time during the month of June, 1946. In case you do not have the present address of any of said parties, please give the latest address shown in your records.

TENNEY & DAHMAN,

By /s/ E. H. TENNEY, JR.;

EISENHOWER, HUNTER,
RAMSDELL & DUNCAN,

By /s/ CHAS. D. HUNTER, JR.,
Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed February 16, 1955.

[Title of District Court and Cause.]

ANSWERS TO INTERROGATORIES PROPOUNDED BY DEFENDANTS

Plaintiff, United States of America, makes answer to each and all of the several interrogatories contained in defendants' single Interrogatory propounded by defendants (served February 16, 1955) as follows:

The plaintiff has no information or knowledge as to the names or addresses of Mess Sergeants or other persons in charge who were on duty at any messes at Fort Lewis, Washington, at any time during the month of June, 1946.

Such list of Mess Sergeants would be designated "temporary and unofficial," and belonged at said time in 1946 to the Second Division, then occupying Fort Lewis, and was not taken to Korea by said Division.

In the absence of a permanent record or any existing record of such names and addresses, plaintiff is unable to supply defendants with any of the information requested in their interrogatories herein propounded.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ GUY A. B. DOVELL,
Assistant U. S. Attorney.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed February 28, 1955.

[Title of District Court and Cause.]

MOTION TO COMPEL ANSWER TO INTERROGATORIES

Come now the defendants herein and state to the Court that heretofore, on February 16, 1955, defendants propounded to plaintiff certain interrogatories under Rule No. 33 of the Rules of Civil Procedure, which said Interrogatories requested the names and addresses of Mess Sergeants or other persons in charge of messes at Ft. Lewis, Washington, during the month of June, 1946; that thereafter on or about February 28, 1955, counsel for plaintiff filed plaintiff's Answers to Interrogatories, in which plaintiff denied having any knowledge or information as to such names or addresses of such Mess Sergeants or other persons in charge of messes at Ft. Lewis at said time, and alleging that any list of Mess Sergeants would be designated "temporary and unofficial" and not taken by the Second Division of the United States Army when it left Ft. Lewis.

Defendants state that although there may not be in existence any single and separate complete list of Mess Sergeants or other persons on duty at said time and place, such information is, to the best knowledge of defendants, in the possession of plaintiff, the United States Government, through its various instrumentalities and departments; that records are kept at the United States Army Records Center in the City of St. Louis, Missouri, relating to each company of each army regiment, wherever said company was on duty at the time in question;

that defendants, through their counsel, have contacted said agency of the United States Government at St. Louis, Missouri, and defendants state upon information and belief that complete records may be obtained by counsel for plaintiff through said department, if not through other departments, and that counsel may obtain from the records of the United States Government, plaintiff herein, the names and addresses requested in the Interrogatories heretofore submitted by these defendants.

Wherefore, defendants pray that this Court order and direct plaintiff to answer the aforesaid Interrogatories, heretofore propounded to plaintiff by these defendants.

TENNEY & DAHMAN,

By /s/ E. H. TENNEY, JR.:

EISENHOWER, HUNTER,
RAMSDELL & DUNCAN,

By /s/ CHAS. D. HUNTER, JR.,
Attorneys for Defendants.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed March 30, 1955.

[Title of District Court and Cause.]

AMENDED ANSWERS TO INTERROGATORIES PROPOUNDED BY DEFENDANTS

Plaintiff, United States of America, makes this its Amended Answers to Interrogatories propounded by defendants (served February 16, 1955, and Motion served March 30, 1955), as follows:

That the interrogatories propounded by defendants request the names and current addresses of mess sergeants or other persons in charge of messes at Fort Lewis, Washington, during the month of June, 1946, and the Motion to compel answer thereto avers that although there may not be in existence a separate and complete list of such personnel, a list thereof can be compiled from the records in the possession of the United States Government, which are maintained at the Military Personnel Records Center, TAGO, St. Louis 20, Missouri.

That the monthly personnel rosters of Army units stationed at Fort Lewis, Washington, during June, 1946, together with other unit-type personnel records of such organizations, are on file in the Military Personnel Records Center; however, the military specialties and/or duty assignments of the personnel who were members of the units concerned are not recorded therein. In this connection, the regulations governing preparation of unit rosters and morning reports in effect during June, 1946, did not require the entry thereon of the military occupational specialties or duty assignments of personnel.

That from an examination of the retained administrative files of Fort Lewis, the names of six persons who held duty assignments relating to food supervision during the month of June, 1946, have been ascertained. That the names and last known addresses of these persons are, as follows.

1. Lt. Col. Robert Ryer, III, O 474 134, Det. 1, 9111th Technical Service Unit, Food and Container Institute School, Chicago, Illinois.

2. Major Robert P. Firman, U. S. A. Ret., 4130 North 30th Street, Tacoma, Washington.

3. Major Norman F. Gore, U. S. A. R., 1478 Coventry Road, Concord, California.

4. Major George A. Inglis, U. S. A. R., 2214 Elliott Street, Muskogee, Oklahoma.

5. James A. Foster, Route 1, Box 268, Olympia, Washington.

6. Carl R. Stewart, 1607 Thompson Boulevard, Ventura, California.

Dated this 15th day of June, 1955.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ GUY A. B. DOVELL,
Assistant U. S. Attorney.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed June 15, 1955.

United States District Court, Western District of Washington, Southern Division

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MIKE H. KOSTELAC and MARYLAND CASUALTY COMPANY, a Corporation,

Defendants.

REPLY TO COUNTERCLAIM

Comes now the plaintiff, United States of America, and for its reply to the counterclaim of defendants filed with their answer, alleges as follows:

First Defense

I.

Answering paragraph numbered 1 of said counterclaim, plaintiff admits that defendant Kostelac, prior to submitting his bid herein, made personal inspections of garbage containers at Fort Lewis, but denies that the Contracting Officer or any legal representative of the plaintiff was aware of the failure of Kostelac's predecessor to collect garbage each day as provided in the contract then in force, and in said connection plaintiff states that, on the other hand, the contracting officer warned defendant Kostelac that his estimates of the amount of garbage

that would be available under his prospective agreement were too optimistic.

II.

Answering paragraphs 2 and 3 of defendants' counterclaim, this plaintiff alleges that if a mistake, as therein alleged, was made, it was defendant Kostelac's sole responsibility, and after the aforesaid warning, and was neither induced by nor contributed to by any representative of the Government, the plaintiff herein.

III.

Plaintiff denies each and every allegation contained in the counterclaim except those hereinabove admitted.

Second Defense

Further answering said counterclaim of defendants, and by way of an Affirmative Defense thereto, plaintiff United States of America alleges as follows:

I.

That the method of computing the amounts to be paid by defendant Kostelac under the contract was an innovation and Kostelac's bid was the only one received pursuant to the subject invitation, and there was nothing in the situation which did or could have put the contracting officer on notice of the probability of an error in the bid thus requiring him to obtain verification before making the award, and accordingly, if a mistake was made it was due to Kostelac's own carelessness and competitive reck-

lessness in submitting such bid, and was neither induced by nor contributed to by any representative of the Government, it being a matter solely of his own choice, selection and responsibility, after his personal inspections at various times of the garbage containers at Fort Lewis prior to submitting his bid.

II.

That following his inspections, the defendant, Kostelac, signed a contract with plaintiff in which the estimated amount of kitchen waste is given as .04 pounds per man per day, approximately the amount he received and a little less than actually available.

III.

That defendant Kostelac now seeks, by his counterclaim, to retroactively condition his agreement on the amount of waste to be collected thereunder, in the face of the invitation, which became a part of such agreement, containing the following provision:

> "Article I. No assurance is given that the quantities of the items or the number of kitchens or families, or the number of men subsisted, as stated herein, will not vary during the life of the contract; and any contract that may be awarded hereon will in no sense be conditioned on either the amount of waste to be collected, the number of kitchens or families, or the number of men subsisted, from time to time." (Emphasis supplied.)

Wherefore, plaintiff prays that the defendants' counterclaim be dismissed with costs.

/s/ CHARLES P. MORIARTY,
United States Attorney;

GUY A. B. DOVELL,
Assistant U. S. Attorney.

Receipt of copy is herewith acknowledged.

[Endorsed]: Filed November 10, 1955.

[Title of District Court and Cause.]

MOTION TO DISMISS DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiff, United States of America, by and through its attorneys of record, the undersigned, and moves this Court that it dismiss the motion of the defendants for summary judgment for the reasons:

1. Rule 56(e) of the Federal Rules of Civil Procedure provides that affidavits shall be made on personal knowledge, shall set forth facts as will be admissible in evidence, and shall show affirmatively that the affiant is competent in the matters stated therein.

2. That the allegations as contained in the affidavit of defendant Kostelac, filed in support of defendants' Motion, are not made in compliance with said Rule 56(e).

This Motion is based upon the records and files

herein and the law and rules of court in such case made and provided.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ GUY A. B. DOVELL,
Assistant U. S. Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed November 10, 1955.

[Title of District Court and Cause.]

PLAINTIFF'S MEMORANDUM OPPOSING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The plaintiff in opposition to defendants' Motion for Summary Judgment on the basis of the alleged facts there enumerated and numbered 1 to 7, inclusive, and set forth below, expressly refutes each and all of same and submits herewith its response to defendants' respective contentions, as follows:

I.

"1. The Contract in Issue Was Entered Into Under Mutual Mistake of the Parties as to a Material Fact."

Kostelac contends that he made a serious mistake by overestimating the amount of garbage that would be available, and accordingly he seeks judgment in favor of defendants.

Kostelac asserts in his pleadings herein that he notified the Contracting Officer later of his mistake, but there is no charge that the Contracting Officer was aware of the failure of Kostelac's predecessor to collect garbage each day as provided in the contract then in force. However, there is evidence of record that the Contracting Officer warned Kostelac that his estimates of the amount of garbage that would be available under his prospective agreement were too optimistic. But such warning was lost on Kostelac. He had made his own personal inspections and apparently could not be persuaded thereby to reconsider his estimates.

The method of computing the amounts to be paid by Kostelac under the contract was an innovation, and Kostelac's bid was the only bid received pursuant to the subject invitation. There was nothing in such situation which could have put the Contracting Officer on notice of the probability of an error in the bid, thus requiring him to obtain verification before making the award.

Aside from the foregoing, there are elements present in this case which cast some doubt on the validity of the assertion that the mistake in estimating the amount of garbage was solely responsible for Kostelac's default. These arise from the statement in the memorandum submitted by Kostelac's present attorneys to plaintiff's counsel, (page 7) and confirmed by other evidence of record that Kostelac, during part of the time he operated under his contract, picked up the garbage from

Fort Lewis and dumped it in Puget Sound, and from the fact that during this period the price of hogs was rising and thereby putting into effect the higher rates of payment provided for in the agreement. If Kostelac needed even more garbage than he was receiving, as he consistently maintained, his conduct in dumping what he obtained is inexplicable, but if the rising price of hogs required him to pay more than he had contemplated, the failure to get the estimated quantity might have been considered a plausible excuse for defaulting on an unexpectedly unprofitable agreement.

II.

"2. (In the Alternative) The Contract Was Entered Into by Reason of a Unilateral Mistake by Defendant Kostelac Which Under the Law Is a Basis for Rescission of Said Contract."

In refutation of defendants' allegation in their motion "that there is no dispute that plaintiff had notice that defendant Kostelac bid twice too high," plaintiff asserts that the Contracting Officer warned defendant Kostelac that his estimates of the amount of garbage that would be available under his prospective agreement were too optimistic, and denies that there was anything in the circumstances of Kostelac's bid which did or could have put the Contracting Officer on notice of the probability of an error in the bid, thus requiring him to obtain verification before making the award, and for such reason any mistake made by Kostelac was his sole responsibility and was neither induced by nor con-

tributed to by any representative of the Government.

Despite his assertion of mistake, the fact remains that after his inspection Kostelac signed a contract with plaintiff in which the estimated amount of kitchen waste is given as .04 pounds per man per day and which amount is approximately what he received, perhaps a little less than actually was available. The invitation which became a part of the agreement contains the following provision:

"Article I. No assurance is given that the quantities of the items or the number of kitchens or families, or the number of men subsisted, as stated herein, will not vary during the life of the contract; and any contract that may be awarded hereon will in no sense be conditioned on either the amount of waste to be collected, the number of kitchens or families, or the number of men subsisted, from time to time." (Emphasis supplied.)

Kostelac, in this action, seeks to retroactively condition his agreement on the amount of waste to be collected thereunder.

The case would seem to fall squarely within the oft repeated rule that where a bid is accepted in good faith, a valid and binding contract is consummated. Cases exemplifying the enforcement of this rule are:

United States v. Purcell Envelope Company, 249 U.S. 313; American Smelting and Refining Company v. United States, 259 U.S. 75; Frazier-Davis

Construction Co. v. United States, 100 C.Cls. 120, 163; Ogden & Dougherty v. United States, 102 C.Cls. 249, 259; Saligman, et al., v. United States, 56 F. Supp. 505, 507.

It is equally well settled that a valid contract must be performed as written even though unforeseen difficulties are encountered which render performance more burdensome or even occasion a pecuniary loss to the party charged with such performance.

Columbus Railway, Power & Light Co. v. Columbus, 249 U.S. 399; Blauner Construction Co. v. United States, 94 C.Cls. 503; Penn Bridge Co. v. United States, 59 C.Cls. 892.

III.

"3. Regardless of Mistake, Said Contract Is Unenforceable for the Further Reason That the Price Is Based Upon Market Publications Not in Existence."

In his affidavit dated February 9, 1955, offered in support of his Motion for Summary Judgment, Kostelac produces the following extraneous information:

"4. Affiant further states that he has examined letters from plaintiff's Department of Agriculture Livestock Division, Rates & Registration Section, admitting that there is no market news service conducted by said Department of Agriculture at Seattle, Washington, stating that the only reports published by said Department in the State of Washington are in Spokane, Washington, and admitting

that such situation was true over the entire period of this contract, and at the time said contract was entered into." (Emphasis supplied.)

While Kostelac has verified his counterclaim, he did not verify Paragraph 12 of the Answer, which states:

"12. Further answering, defendants state that said contract, Exhibit "A," is unenforceable by plaintiff against defendants for the further reason that the prices set out therein to be paid by defendant Kostelac for garbage on Continuation Sheet (2) were specifically based upon prices (Paragraph A) to be "published * * * at the Seattle Stock Yard Market located at Seattle, Washington," whereas in fact there was not at the time said contract was entered into, and never has been since said time, any publication at said alleged market, nor has there been any individual Seattle Stock Yard Market located at Seattle, Washington."

Counsel for defendants apparently have preferred to have the alleged facts in support of this contention read, in the Motion, as follows:

"Defendants state that it appears from the pleading in Paragraph 12 of the Answer herein, together with Paragraph 4 of the Affidavit of defendant Kostelac, that there is no dispute as to the fact that there was no market publication at Seattle, Washington, Stock Yard during the period of this contract; that this fact is admitted by plaintiff's own Department of Agriculture; and defendants state

that by reason thereof, said contract is vague, uncertain and unenforceable and the price therein is based upon certain quotations not in existence."

As appears from Paragraph VII of the Complaint, payment for collecting and removing garbage was on the same basis in the replacement contract, which contained the identical provision for computation as found in the contract with defendant.

In the light of the apparent facts, plaintiff disputes the factual basis upon which defendants arrive at their conclusion that the contract, in the following respect, is "vague, uncertain and unenforceable," to wit:

"a. The selling price of hogs, good and choice, of 200 pounds weight as published on the 15th day of each month at the Seattle Stock Yard Market, located at Seattle, Washington, * * *."

Defendant Kostelac makes no claim of having undertaken to ascertain if such prices were published at Seattle, as stated in the contract.

IV.

"4. Plaintiff Has Disenabled Itself From Performing This Contract After the Alleged Breach by Defendant Kostelac, in That the Number of Men at Ft. Lewis Fell Far Below the Contract Estimate on Which the Price Was Based."

In refutation of the above statement and the assertion thereunder that the plaintiff failed to fur-

nish 40,000 rations estimated, and for that reason plaintiff is not entitled to recover, this plaintiff refers the defendants for its answer thereto to the wording and terms of Article I, as set forth in Paragraph II of this memorandum.

V.

"5. Plaintiff Has Alleged No Facts in Paragraph VI of the Complaint to Justify Its 'Declaring Said Contract in Default' and Suing for the Breach."

The contract, as exhibited with defendants' answer filed herein, not only calls for the collection and removal of the garbage but also requires that payment be made therefor on the tenth of each month. The complaint alleges that defendant Kostelac collected and removed garbage for a 5-6 month period, and that he failed to make payment for any garbage collected under the contract. It should be clear to the defendants from that language that the contract was breached and that under Paragraph 7 of the contract the Government properly might dispose of the garbage elsewhere and recover any loss which might result therefrom.

Defendants' contention is in the nature of the defense of "failure to state a claim upon which relief can be granted." Rule 12 of Federal Rules of Civil Procedure, provides: "A Motion making any of these defenses shall be made before pleading if a further pleading is permitted." In this instance,

the Motion refers to the Answer and is, therefore, subsequently made.

VI.

"6. There Is No Liability Under the Bid Bond Because the Amount of the DeBoer Contract Is Not in Excess of the Kostelac Contract, as Required by the Specific Wording of Said Bond."

Paragraph 1 of the General Provisions of the contract provides that in case of the successful bidder the amount inclosed with the bid will be retained as guarantee for the performance of all the terms and conditions of the purchase. In view thereof, there can be no question concerning the purpose of the bond, whereas if the terms of the bond are given the effect urged by defendants, the bond will have served no useful purpose since, by the nature of the transaction, the Government could incur a loss only in the event the replacing contract were less than the defaulted contract. Accordingly, since the bond was intended to serve as a guarantee for the performance of the contract, and since the terms of the bond are ambiguous insofar as such purpose is concerned, it is submitted that in such circumstances the terms of the bond should be given the meaning which the parties intended.

VII.

"7. There Is No Liability for Damages Under the Other Provisions of the Contract."

The defendants' above contention apparently is

made in reference to Paragraph VII of the Complaint, which states:

"That by reason of the failure and refusal of defendant Mike H. Kostelac to perform his said contract to collect and remove kitchen waste, as aforesaid, the plaintiff was obliged to, and did enter into Contract No. W45-016 (A.A. VI) S-261, dated December 13, 1946, with John DeBoer, Route 2, Box 370, Olympia, Washington, the highest bidder under readvertisement, for the services required by said defendants' contract, to be performed under the same conditions, during the period beginning December 16, 1946, and ending June 30, 1951, with payment on the same basis, at the sliding rate provided for therein."

Paragraph 7 of the General Provisions of the contract provides in part that

"* * * unless the purchaser pays for and removes the property as required by the provisions of this contract, the Government shall have the right to dispose of the property and hold the purchaser responsible for any loss incurred by the Government as a result of a failure to pay for or remove the property; the time of removal and such other details of removal as may not be provided for herein, shall be arranged with the Contracting Officer."

The reference in Paragraph VII of the Complaint to the defendants' "failure and refusal to perform his contract" correctly charges his refusal

to pay the contract price for the garbage; and while it is true that the Government has received pay for the garbage under the replacement contract with DeBoer, the amount thereof was, as indicated in Paragraph VIII of the Complaint, less than that which was payable under the Kostelac contract because of the higher sliding rates provided in the Kostelac contract, otherwise there would be no chargeable difference to Kostelac during the period of the replacement contract, as alleged therein. Such being the case, the defendants' seventh contention is also without merit.

Discussion of Cases Cited by Parties

Dean Wm. Minor Lile in his "Notes on Equity Jurisprudence" in discussing mistakes calling for rescission observes:

> "In the case of mistake calling for rescission, there has never been any real contract between the parties—their minds not having met on the same thing at the same time. On the other hand, Reformation implies two things, to wit: (1) A valid contract, well understood by both parties; (2) A subsequent reduction thereof to writing and a mistake in this reducing it to writing." (Emphasis supplied.)

Practically all the cases cited by defense counsel and discussed in their memorandum in support of their Motion for Summary Judgment consist of cases involving what might be termed "typographical errors," where the contractor omitted through inadvertence from the total of his bid some sub-

stantial item of cost he intended to include or overlooked, and save immediate notice to the other party.

These cases did not involve a past performance and a subsequent breach as in the instant case.

In Brown v. Bradley, 259 S.W. 676; Chicago, St. P. M. & O. Ry. Co. v. Washburn Land Co. 161 N.W. 358; Smith v. Mackin, 4 Lans. (N.Y.) 41; Chaplin v. Korber Realty, Inc., 224 Pac. 396, the mistakes involved were comparable to "typographical errors" claimed in the other cases above mentioned.

The remaining cases cited by counsel are: Hearne v. N. E. Mutual Ins. Co. 20 Wall 488, 22 L.Ed. 395; and Thwing v. Hall & Ducey Lumber Co., 41 N.W. 815, and New York Trust Co. v. Island Oil Transport Corp. 34 F (2d) 653.

In the Hearne case a bill was filed in the Circuit Court for the District of Mass. for the reformation of a contract of insurance, which was dismissed by the Circuit Court, and the Supreme Court affirmed its decision. The result in this case of deviation from the terms of Marine Insurance was annulment of the contract as to the future, forfeiture of premium to the underwriter, equity in such case following the law, but the matter of rescission was not in question.

We fail to find any analogy whatsoever between the suit to recover purchase money at a certain price in the case of Thwing, et al., v. Hall & Ducey Lumber Co., 41 N.W. 815, and in the instant case.

However, in the event an analogy should be found, we request the addition of the following provision to the quotation so far appearing:

"* * *, provided the parties can be restored to or have not changed their original positions."

The case of New York Trust Co. v. Island Oil Transport Corp. 34 F (2nd) 653, was concerned with a personal covenant, not assignable, and by no stretch of the imagination could it be considered a case here in point.

The law in Washington applicable to the facts in the instant case, is well expressed in Thiel v. Miller, 122 Wash. 52, where at page 56, the Supreme Court said:

"The principal contention here made in behalf of appellants is that there was a mutual mistake of the parties as to the conditions of the loan secured by the mortgage such as to entitle appellants to rescind the sale contract. We cannot agree with this contention. There was a want of remembrance and knowledge of the conditions of the loan secured by the mortgage, which in a sense may be said to have been mutual; but it was a conscious want of remembrance and knowledge, in face of which the contract was voluntarily entered into. Miller seemingly did have some desire to learn the exact terms of the loan, in addition to the total amount thereof, which he was to assume; but that he did not learn the terms of the loan and that he knew he was ignorant thereof, except as to its total amount and its extreme limit as to time, and that he voluntarily en-

tered into the contract of purchase in the face of his conscious ignorance of the conditions of the loan, seems well established by the evidence. This, we think, is not in law such mistake as would entitle appellants to rescission of the contract. The law applicable to such facts is admirably stated in 2 Pomeroy's Equity Jurisprudence (4th ed.), §855, as follows:

> "When parties have entered into a contract or arrangement based upon uncertain or contingent events, purposely as a compromise of doubtful claims arising from them, and where parties have knowingly entered into a speculative contract or transaction—one in which they intentionally speculated as to the result—and there is in either case an absence of bad faith, violation of confidence, misrepresentation, concealment, and other inequitable conduct mentioned in a former paragraph, if the facts upon which such agreement itself, turn out very different from what was expected or anticipated, this error, miscalculation, or disappointment, although relating to matters of fact, and not of law, is not such a mistake, within the meaning of the equitable doctrine, as entitles the disappointed party to any relief either by way of canceling the contract and rescinding the transation, or of defense to a suit brought for its enforcement."

And with respect to price agreed upon in the contract, it was held in American Smelting Co. vs. U.S. 259 U.S. 75, in the language of headnote 4(b):

"The claimant, having completed deliveries after alleged delays in shipping orders and after the government price had been increased under the Act of August 29, 1916, supra, (39 Stat. 649), could not, in respect of such deliveries, claim freedom from the contract because of such delays and recover the difference between the new and contract prices upon the theory that the deliveries were compulsory and called for a fair compensation under the National Defense Act and the Fifth Amendment."

In connection with the claim of hardship as set up by the defendants, the plaintiff cites the case of U. S. v. Purcell Envelope Company, 249 U.S. 313, where the Supreme Court allowed the contractor a profit item of $185,331.76, for the government's failure to award bid of approximately $2,500,000 for supply of envelopes for four years.

In Saligman v. U.S. 56 F. Supp. 505, the Court found "the defendant had no notice prior to its acceptance of plaintiff's bid that there was any error in the bid submitted, and stated in that connection, at page 507:

"There is no dispute as to the law applicable in this controversy. Ordinarily no relief will be granted to a party to an executory contract in the case of a unilaterial mistake. In such case when a bid has been accepted the bidder who has made a mistake will be bound and must bear the consequences thereof." (Cases cited).

See especially in this connection, the decision of the Supreme Court in Columbus Railway, Power & Light Company v. City of Columbus, 249 U.S. 399, where at page 410, the Court said:

"There is no showing that the contracts have become impossible of performance."

* * *

"We are unable to find in the allegations in this bill any statements of facts which absolves the company from the continual obligation of its contracts unless the facts to which we have referred bring the case, as is contended, within the doctrine of viz major, justifying the company in its attempt to surrender its franchise, and be absolved from further obligation."

Kostelac did not omit any item, as in the cases cited by him, from the total of his bid. He knew what was contained in the contract entered into by him with the government. If for some ulterior reason, he found or concluded its performance would not be as profitable as anticipated, the same would not be a basis for rescission or cancellation asked by defendants.

Respectfully submitted,

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ GUY A. B. DOVELL,
Assistant United States
Attorney.

Receipt of copy acknowledged.
[Endorsed]: Filed November 10, 1955.

[Title of District Court and Cause.]

PRETRIAL ORDER

As the result of pretrial conferences heretofore had, whereat the plaintiff was represented by Guy A. B. Dovell, Esq., Assistant United States Attorney, of counsel for plaintiff, and the defendants were represented by George M. Hartung, Jr., Esq., of Eisenhower, Hunter, Ramsdell & Duncan, their attorneys of record, the following issues of fact and law were framed and exhibits identified:

Admitted Facts

1. That the United States Attorney herein is acting on behalf of the plaintiff under the direction and authority of the Attorney General of the United States.

2. That jurisdiction of this Cause and this Court exist by reason of Title 28, U.S. Code, Section 1345.

3. That defendant Mike H. Kostelac has duly entered his apearance herein, and has submitted to the jurisdiction of this Court.

4. That at all times mentioned herein the defendant Maryland Casualty Company has been, and now is a corporation organized and existing under and by virtue of the laws of the State of Maryland, having a place of business in Tacoma, Washington, and authorized to do business in the State of Washington; and has designated a person residing and

who now resides in Seattle, Washington, in said Western District of Washington, upon whom process in civil actions against said corporation may be served as the representative of said corporation; and that service has been duly made upon said defendant, and said defendant has entered its appearance in this action.

5. That on or about June 29, 1946, defendant Mike H. Kostelac entered into a contract in writing with the United States of America, plaintiff herein, said contract being designated "Contract No. W-45-016 (S.C.-IX) S-497," a duly authenticated copy of which is included in the list of identified exhibits herewith presented to the court. That said contract consists of defendant Kostelac's bid dated June 26, 1946, and the plaintiff's acceptance as to Item 2 thereof, dated June 29, 1946, a duly authenticated copy of which is included in the list of identified exhibits herewith presented to the court.

6. That pursuant to Provision No. 1 of the General Provisions of said contract, defendant Mike H. Kostelac executed and furnished to the United States of America, plaintiff herein, a "Form of Bid Bond," a duly authenticated copy of which is included in the list of identified exhibits herewith presented to the court; that the defendant Maryland Casualty Company, a corporation, was the surety upon said bond, and that said bond was signed by both defendant Mike Kostelac and de-

fendant Maryland Casualty Company by its attorney in fact for said Casualty Company.

7. That defendant Mike H. Kostelac collected and removed kitchen waste or garbage (which terms are used synonymously herein) from Fort Lewis beginning on July 1, 1946, and ending on December 15, 1946; that defendant Kostelac has made no payments for any garbage collected under said contract; that under these circumstances the plaintiff sent the defendants by registered mail identical letters dated November 27, 1946, copies of which are included in the exhibits herewith presented to the court.

8. That the United States of America, plaintiff herein, thereafter entered into Contract W-45-016 (A.A.-VI) S-261, dated December 13, 1946, with John DeBoer, Route 2, Box 370, Olympia, Washington, the highest bidder under readvertisement, for the services required by the balance of defendant Kostelac's contract, to be performed under the same conditions, during the period beginning December 16, 1946, and ending June 30, 1951, with payment on the same basis, at the sliding rate provided for therein, the application of which sliding scale set up in each contract is contained in the audit of the account between the plaintiff and defendant made by the Comptroller of the United States, a duly authenticated copy of which audit is included in the list of exhibits hereinafter set forth. That the reason given by plaintiff for entering into said new contract with John DeBoer was the alleged failure

and refusal of defendant Mike H. Kostelac to pay for said kitchen waste.

9. That the Comptroller General of the United States of America, plaintiff herein, has audited the account between the plaintiff and defendants, and the audit of said Comptroller General is accepted by the defendants with respect to the market price of hogs on dates in question, the quantities of rations (number of men) unit prices and totals thereunder as well as the relet prices and totals thereof; provided, however, that such acceptance of the correctness of said audit does not admit liability on the part of the defendants, which matter is reserved in defendants' right to question the validity of the Kostelac Contract, and to question whether said contract may be rescinded, all as more particularly set forth in defendants' contentions hereinafter stated.

10. The prices set out in said exhibited Account correctly state the prices of hogs quoted in the Seattle Post Intelligencer at the times and dates in question and is accepted as being in substantial compliance with the standard set up in each of the said contracts to ascertain the price of garbage by formula based upon hog prices published at the Seattle Stock Yard Market.

11. That the price, under the aforesaid contract with Mike Kostelac, for garbage collected by said defendant Kostelac from July 1, 1946, to December 15, 1946, amounted to the sum of $24,261.16, and the amount of money received from DeBoer under the replacing contract during the period of

DeBoer's contract was $80,102.24 less than the amount that would have been received from defendant Kostelac under the formula and terms of Kostelac's contract, the total of which amounts is the sum of $104,363.40, all as more particularly shown in said audit made an exhibit hereto. That no part of said total amount has been paid by defendant Mike H. Kostelac or defendant Maryland Casualty Company; that the aforesaid contract with Mike H. Kostelac, the replacing contract with DeBoer, as aforesaid, and the Bid Bond referred to above are public records, filed, known and designated in the General Accounting Office of the United States by the respective numbers heretofore set forth.

12. That written notice of the amount claimed by the plaintiff herein, in accordance with said audit by the aforesaid General Accounting Office, together with notice of the nature of said claim as shown in said audit of account included in list of identified exhibits was given to defendant Mike H. Kostelac and defendant Maryland Casualty Company on or about January 16, 1952; but that said defendants have failed, refused and neglected to pay said sum or any part thereof, despite repeated demands.

13. That plaintiff makes claim herein against defendant Mike H. Kostelac, as stated above, in the sum of One Hundred Four Thousand Three Hundred Sixty-three Dollars and Forty Cents ($104,363.40) plus interest at the legal rate from July 1, 1951; and makes claim against defendant Maryland

Casualty Company in the sum of Forty Thousand Dollars ($40,000.00), with interest thereon at the legal rate from July 1, 1951, together with plaintiff's costs herein; that said sum of Forty Thousand Dollars ($40,000.00) is a part of, and not in addition to, the claimed liability of defendant Kostelac in the sum of One Hundred Four Thousand Three Hundred Sixty-three Dollars and Forty Cents ($104,363.40).

14. That prior to entering into said contract between plaintiff and defendant Kostelac, defendant Kostelac was verbally requested by the Contracting Officer to inspect the amount of garbage that was being accumulated at messhalls at Fort Lewis; that in addition to said verbal request, the written Invitation to Bid sent to defendant Kostelac by the Government, in General Provision 5, and also in Paragraph 3 of Page 1 of the Invitation, requested such inspection, and set the days of June 21st to June 26th, 1946, between the hours of 8:00 a.m. to 4:30 p.m. daily except Saturday and Sunday as the dates for such inspection; that inspections were thereafter made by defendant Kostelac pursuant to such verbal and such written invitations.

15. That in suggesting such inspection by defendant Kostelac, the Contracting Officer had no personal knowledge that garbage and kitchen waste were not being picked up daily from the messes referred to in said contract and said Invitation to

Inspect, and he personally assumed that such garbage and kitchen waste were being picked up daily, as required in the written contract; that if defendant Kostelac was misled by the amount of kitchen waste and garbage inspected by him in said containers, it was not due to any intentionally misleading acts on the part of said Contracting Officer; that in fact said Kostelac was told by the Contracting Officer that his estimates of the amount of garbage that would be available under his prospective agreement were too optimistic; that shortly after the defendant Kostelac commenced to collect garbage he advised the Contracting Officer at Ft. Lewis that it was his opinion, based upon the amount of garbage that he was collecting, that the prior party collecting garbage had not collected it daily as required by his contract; that the Government, shortly after being notified by defendant Kostelac of the alleged mistake, caused an investigation to be made of such alleged facts, including the contacting of witnesses at or near Ft. Lewis, including Government personnel, who were considered to be in a position to know such facts, and that the Government was unable to find any witness or other evidence to refute the contention of defendant Kostelac that pickups of garbage at said time and place were not made daily; that prior to the time defendant Kostelac inspected the garbage containers as aforesaid, there had been some complaints at Fort Lewis that garbage was not picked up every day at certain messhalls, but the Government is not informed as to when these complaints were made;

that the Government admits that it may be the fact that all the garbage was not picked up every day at the time and place in question; that the Contracting Officer did not personally inspect said containers for garbage or kitchen waste, and was therefore not personally acquainted with the level of said containers at the time of inspection, and was not personally acquainted with the fact of whether said containers were filled to the level of two-days' waste or one-day's waste.

16. That the garbage collection contract which was in operation at Fort Lewis on the dates of inspection by defendant Kostelac, shortly prior to the letting of the aforesaid contract with Kostelac, required that the person picking up the garbage and kitchen waste at said time make daily pickups of all garbage; that the Contracting Officer for plaintiff relied upon such provisions of said contract, was not personally aware of any violations of said provision of said contract and accordingly stated to defendant Kostelac, prior to his bidding on the contract that the waste or garbage in said containers should represent a one-day's accumulation thereof.

17. That the inspection of said containers for garbage was considered by the Contracting Officer for plaintiff an important procedure and step prior to letting the aforesaid contract, in order to estimate the probable amount of garbage under existing conditions, practices and procedures, and defendant Kostelac was advised by the Contracting Officer of the importance of such inspection.

18. That on or about July 10, 1946, following the commencement of operations under the aforesaid contract by said defendant Kostelac, said Kostelac advised the Headquarters Sixth Army, Presidio of San Francisco, he had talked with the Contracting Officer, Fort Lewis, on the matter of his contract for the purchase of garbage, and further advised said Headquarters he had made a mistake in estimating the amount of garbage, assigning as reason for such mistake, in brief, that the garbage containers so inspected by defendant Kostelac had contained a two-day accumulation of garbage rather than a one-day accumulation.

That a few days thereafter, said defendant Kostelac, through his attorney, by letter dated July 18, 1946, gave written notice to said Contracting Officer that he considered he had made a mistake, and therewith advised of his alleged difficulty in operating his business, a hog farm, successfully and on a profit from so small an amount of garbage.

That defendant persistently pursued efforts to have the Government modify, adjust, or cancel his said contract, addressing his communications in that respect to both the military and congressional authorities, and during which time, on or about July 24, 1946, defendant Kostelac undertook renegotiation of his contract with the Contracting Officer at a reduced sliding scale submitted by him, which renegotiation was subject to its approval by the Headquarters Sixth Army; that, however, upon referral of the same to said Headquarters, on

or about August 2, 1946, it was the determination of said Headquarters that, upon acceptance by the Contracting Officer of said contract, certain rights accrued to the Government of the United States, that the War Department was without authority to release these rights, and that accordingly said contract would be enforced in accordance with the provisions thereof.

The above decision of Headquarters, Sixth Army, was confirmed on or about September 27, 1946, by the Director of Service, Supply and Procurement, Washington, D. C., and the Commanding General, Headquarters Sixth Army, Presidio of San Francisco, California, so advised.

That Kostelac continued to collect said garbage, but without paying therefor; such collection continuing until on or about December 15, 1946, when said replacing contract to DeBoer was let following notice to each of said defendants as hereinbefore stated in Paragraph 7 of this Pretrial Order.

Thereafter by settlement No. U.S. 28564, dated February 28, 1948, a Preliminary Statement of Account was furnished the defendants by the General Accounting Office.

19. That preliminary to and immediately preceding the letting of the garbage contract in 1946, there was distributed, during the latter part of May and first part of June of said year, the usual annual Invitations to Bid for garbage disposal to approximately 21 prospective bidders, including

said Kostelac, following his request for an opportunity to bid on the annual contract.

That in previous years it had been routine procedure that contracts for garbage disposal were awarded on a yearly basis due to lack of bidders available and the unwillingness of bidders to contract for more than one year. That, however, all invitations provided for alternate types of bidding, namely, (1) on a fixed price per man per month basis, (2) fixed price per ton, (3) a sliding scale per man per month based upon published market prices of hogs, and (4) a sliding scale per ton based upon published market prices of hogs.

That accordingly the above Invitation to Bid, numbered 53, for yearly contract was distributed for bid opening set for June 7, 1946, at which time two bids were received, one each from John DeBoer and Mike Kostelac, respectively.

That opening of the bids received revealed according to Army records presently available DeBoer as the highest bidder on a straight per man per month fixed price for one year's contract, and also higher than the sliding scale alternate of defendant Kostelac based upon then current market conditions, and as a consequence DeBoer's proposed contract was forwarded to Headquarters Ninth Service Command (at that time) for approval as a normal routine procedure.

That thereafter on or about June 20, 1946, instructions were received from said Command by the

Contracting Officer at Fort Lewis with respect to obtaining bids on a sliding scale basis—long term contract upon readvertising, which instructions were complied with and resulted in Invitation to Bid No. 53 being withdrawn and cancelled and new Invitation to Bid, No. 63, prepared and distributed to the two principal bidders, DeBoer and Kostelac, on June 21, 1946, the new form of bid containing only the sliding scale long term provisions, for bids on the one basis, and the date for opening bids set for June 26, 1946.

That said readvertisement resulted in the bid, herein in question, received from Kostelac, the only bid received pursuant to Invitation No. 63, and in Kostelac being awarded the contract. And that the price bid by defendant Kostelac ($.145, maximum on scale, per man per month) was higher than any other comparable bids ever received at Fort Lewis, either before or after the date of said contract.

20. That because of the investigation carried on by the Army officials in the matter and their inability to ascertain whether or not daily pickups of garbage were actually made in accordance with the contract, the plaintiff therefore will not adduce testimony in this respect at the trial hereof.

21. It is stipulated between the parties that the number of men at Fort Lewis over the period of the aforesaid contract with defendant Kostelac is correctly set forth in the audit account of the Comptroller General of the United States, under

the heading "Rations," which audit account is included in list of exhibits to this Pretrial Order.

Plaintiff's Contentions

1. That defendant Mike H. Kostelac entered into a valid written contract with the plaintiff, under the terms of which he agreed to collect and remove daily for a five-year period, commencing July 1, 1946, all garbage or kitchen waste accumulating at all messes at Fort Lewis divisions, Section 5 Hospital, and Mount Rainier Ordnance Depot, averaging 40,000 men, estimated at .04 pounds per man per day, and to pay therefor on a per man per month basis, at the sliding scale of prices provided in the contract, in the total estimated amount of $200,000, payment to be made on or before the 10th day of each month for the garbage removed during the preceding month.

2. That, as required by contract, defendant Mike H. Kostelac executed and furnished the plaintiff a bid bond of even date, in the penal sum of $40,000, conditioned that the defendant enter into a written contract with the plaintiff, in accordance with the bid as accepted, and give bond with good and sufficient surety for the faithful performance and proper fulfiillment of such contract, which bond was executed by Maryland Casualty Company as surety thereon.

That said surety bond was further conditioned for the payment to the plaintiff of the difference between the amount specified in defendant Koste-

lac's bid and the amount for which the plaintiff might procure the required work and/or supplies in case defendant Kostelac failed to enter into such contract and give such bond within the time specified.

3. That defendant Kostelac collected and removed kitchen waste from July 1, 1946, through December 15, 1946, pursuant to said contract, and there became due and owing from said defendant to plaintiff, for such period, the sum of $24,261.16.

4. That defendant Kostelac failed to make payment for any garbage or kitchen waste collected under said contract, and by reason thereof was declared in default and he and his surety were notified by letter dated November 27, 1946, in the matter of said default, in words and figures as hereinabove referred to in Paragraph VII of this Pretrial Order.

5. That by reason of the failure and refusal of defendant Mike H. Kostelac to perform his said contract, the plaintiff was obliged to, and did enter into Contract No. W-45-016 (A.A.VI) S-261, dated December 13, 1946, as hereinbefore stated in Paragraph VII of this Pretrial Order.

6. That due to defendant Kostelac's default under his contract, there is now due and owing to plaintiff United States of America the aforesaid sum of $24,261.16 for garbage collected by said defendant during the period July 1, 1946, through December 15, 1946, and $80,102.24, representing the

difference in revenue obtained by the plaintiff on resale of the garbage to the said replacing contractor, John DeBoer, during the period December 16, 1946, to June 30, 1951, making a total sum of $104,363.40 now due and owing to plaintiff since July 1, 1951, no part of which has been paid, and on account of which defendant Mike H. Kostelac is now indebted to plaintiff in the full sum of $104,-363.40 and interest thereon at the legal rate from July 1, 1951, and defendant Maryland Casualty Company is now in indebted to the plaintiff in the sum of $40,000.00, the amount of its liability herein, with interest thereon at the legal rate from July 1, 1951.

7. That as to defendants' defense of mistake, it is plaintiff's contention, from a factual standpoint, that if such mistake was made it was defendant Kostelac's sole responsibility and was neither induced by nor contributed to by any representative of the plaintiff.

That regardless of the sliding scale methods mentioned in the prior Invitations, the actual method of computing the amounts to be paid by Kostelac under the contract was an innovation, and, in the absence of any other bid, there was nothing in the situation which could have put the Contracting Officer on notice of the probability of any error in the bid, thus requiring him to obtain verification before making the award.

From a legal standpoint, defendant's position appears equally unsound:

(a) Despite his assertion of mistake, the fact remains that after his inspections defendant Kostelac signed a contract in which the estimated amount of kitchen waste is given as .04 pounds per man per day, and this is approximately what he received—perhaps a little less than actually was available.

(b) The invitation which became a part of the agreement contains the following provision:

"Article 1. No assurance is given that the quantities of the items or the number of kitchens or families, or the number of men subsisted, as stated herein, will not vary during the life of the contract; and any contract that may be awarded hereon will in no sense be conditioned on either the amount of waste to be collected, the number of kitchens or families, or the number of men subsisted from time to time." (Emphasis supplied.)

That aside from the foregoing, the admitted dumping or non-use of garbage collected by Kostelac does not support his theory that the insufficiency of garbage prevented his full performance of the contract.

Defendants' Contentions

Defendants contend that under the agreed facts, together with evidence to be presented at the trial, defendants are entitled to rescission of the contract between plaintiff and defendant Kostelac on the ground of "mutual mistake" of the parties; or in the event that the Court finds that a mutual mis-

take did not exist, then by reason of a "unilateral mistake" by defendant Kostelac. Defendants further contend that the Government was in fact disenabled from performing its contract after said contract was signed, and also after the date of the alleged breach by defendant Kostelac, in that the number of men at Fort Lewis, as shown in Exhibit "3," fell so greatly below the general estimate upon which said contract was based, as set out in said contract, that under said facts, and under the law, defendant Kostelac thereafter became fully released from any liability under said contract. Defendant Kostelac also denies that he committed any breach which justified plaintiff in purportedly cancelling his said contract as of December 15, 1946, in that at no time did he fail to collect said garbage from Fort Lewis and remove it from said premises; that his only alleged failure was to pay a price concerning which there was a dispute, and concerning which dispute the plaintiff gave defendant no final answer prior to the time said contract was purported to be cancelled by plaintiff; that there was no other price that said defendant could pay, pending such decision. Defendants also deny liability for the Twenty-four Thousand Two Hundred Sixty-one Dollars and Sixteen Cents ($24,261.16), the alleged contract price of the garbage actually removed by defendant Kostelac, because: Such price is at least twice too high by reason of the mistake for which rescission is prayed herein, and such alleged price cannot be the basis for holding defendants, or either of them, herein. Defend-

ants further contend that there is no liability to plaintiff by either of said defendants under the Bid Bond, by reason of the express wording thereof and under the facts of the case, and that plaintiff has failed to prove an essential condition in said bond.

Issues of Law and Fact

The issues of law and fact are set forth in the respective contentions of the parties, as hereinabove stated.

Exhibits

The exhibits of all parties below listed were produced and marked, and may be received in evidence if otherwise admissible without further authentication, it being admitted that each is what it purports to be. Exhibits not listed will be admitted by the Court where good cause be shown for the withholding or delay in presentation thereof.

List of Exhibits

1. Copy of Government's garbage contract with Mike H. Kostelac, made June 29, 1946, consisting of Kostelac's bid, dated June 26, 1946, and Government's acceptance as to Item 2 thereof, dated June 29, 1946, and including the General Provisions, Articles and Schedules contained in said contract, designated "Contract No. W 45-016 (S.C.-IX) S-497" (6 Photostatic Sheets), and attached thereto a copy of "Standard Government Form of Bid Bond," dated June 26, 1946, made by Mike H. Kostelac, as principal, and Maryland Casualty

Company, as surety, to the United States of America in the sum of $40,000.00 for performances therein specified (2 Photostatic Sheets), said copies being together certified at the direction of the Comptroller General of the United States to be true copies of the official documents on file in the General Accounting Office in the case designated "Mike H. Kostelac," by certificate thereof dated March 21, 1952.

2. Copy of Government's replacing garbage contract with John DeBoer, made December 13, 1946, consisting of DeBoer's bid, dated December 13, 1946, and Government's acceptance on same date, as to Item 2 thereof. and also including the General Provisions, Articles and Schedules contained in said contract, said copy containing ten photostatic sheets, and certified at the direction of the Comptroller General of the United States to be true copies of the official documents on file in the General Accounting Office in the case designated "Mike H. Kostelac," by certificate thereof dated March 21, 1952.

3. Copy of the audit of the account between the plaintiff and defendants made by the Comptroller General of the United States and certified by direction of the Comptroller to be a true transcript, in 5 numbered documents from the books and proceedings of the General Accounting Office in the case designated "Mike H. Kostelac," by certificate thereof dated March 21, 1952. Said audit of account is made an exhibit hereto for the purpose herein-

before stated in paragraph numbered 9 of this Pretrial Order and of showing the written notice, dated January 16, 1952, of amount claimed by plaintiff, in accordance with said audit, as hereinbefore referred to in paragraph numbered 12 of this Pretrial Order.

4. Photostatic copy of letter dated November 27, 1946, from contracting officer, Fort Lewis, relative to default in contract, addressed to Mike Kostelac, Star Route, Gig Harbor, Washington.

5. Photostatic copy of letter dated November 27, 1946, from contracting officer, Fort Lewis, relative to default in contract, addressed to Maryland Casualty Co., 1300 Puget Sound Bank Building, Tacoma, Washington.

Copy of letters referred to herein and next preceding paragraph are made exhibits in accordance with paragraph 7 of this Pretrial Order.

Additional Evidence

At the trial of this cause either and both parties may submit additional evidence on any of the issues of this case provided such evidence shall not contradict any facts agreed to herein. Neither party has demanded a trial by jury, and the trial herein shall be to the Court.

Action by the Court

The Court has ruled that genuine issues as to material facts may not be established by affidavit

offered in support of the defendants' Motion for Summary Judgment, the plaintiff being entitled to its day in Court.

This ruling was formally set forth in the Court's Order entered herein on December 9, 1955.

The foregoing Pretrial Order has been approved by the parties hereto, as evidenced by the signatures of their counsel hereon, and this order is hereby entered, as a result of which the pleadings pass out of the case, and this pretrial order shall not be amended except by Order of the Court pursuant to agreement of the parties or to prevent manifest injustice.

Dated at Tacoma, Washington, this 11th day of May, 1956.

/s/ GEO. H. BOLDT,
United States District Judge.

Form Approved:

/s/ GUY A. B. DOVELL,
Of Attorneys for Plaintiff.

/s/ GEORGE M. HARTUNG, JR.,
Of Attorneys for Defendants.

[Endorsed]: Filed May 11, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause coming on regularly for trial on the 4th day of June, 1956, before the Court, sitting without a jury, plaintiff appearing by its attorneys, Charles P. Moriarty, United States Attorney for the Western District of Washington, and Guy A. B. Dovell, Assistant United States Attorney for said District, and defendants appearing by their counsel, E. H. Tenney, Jr., of Tenney, Dahman & Smith of St. Louis, Missouri, and by George M. Hartung, Jr., of Eisenhower, Hunter, Ramsdell & Duncan, local counsel for defendants; and pursuant to the Pretrial Order heretofore entered the issue herein having been confined to that of defendants' liability, reserved in their right to question the validity of the contract and bond involved in this action and whether the contract may be rescinded, and the further question of whether defendant Kostelac breached his contract; evidence, both oral and documentary, having been introduced, briefs having been submitted and oral arguments having been made, and the cause submitted for decision upon the law and the evidence, and the Pretrial Order and issues presented thereby; and the Court having reviewed the testimony, examined the exhibits introduced, and read and considered the memorandums of counsel, and being fully advised in the premises and having heretofore on June 5, 1956,

announced its decision orally, does now make the following:

Findings of Fact

I.

The jurisdiction of the subject matter of this cause exists by reason of Title 28, U.S.C.A., Section 1345; and the parties defendant have submitted to the jurisdiction of this Court.

II.

On or about June 29, 1946, defendant Mike H. Kostelac entered into a contract in writing with the United States of America, which consisted of his bid, dated June 26, 1946, and the plaintiff's acceptance, dated June 29, 1946, whereby he agreed to collect and remove garbage suitable for hog feed from Fort Lewis, and to pay the price therefor stated in the contract.

III.

In accordance with the provisions of the contract upon which he submitted his bid, defendant Kostelac therewith furnished plaintiff a form of bid bond, signed by him as principal, and by defendant Maryland Casualty Company, as surety, in the penal sum of $40,000.00.

IV.

Thereafter defendant Kostelac entered upon the performance of his garbage contract on July 1, 1946, and in a period of three or four days following commencement of his operations came to the conclusion that he was not obtaining the amount of

garbage he had estimated would be available daily from the messhalls at Fort Lewis.

V.

There is no question but that defendant Kostelac made an error or miscalculation when he prepared his bid on the contract for garbage removal from Fort Lewis, but whether the error was the result of mistake in fact in the narrow legal sense of that term is more questionable. However, it does not appear for sure that it need be decided whether such mistake was unilateral or mutual; for the reason, that if there was either, apparently it came to his attention in three or four days after his entry upon execution of the contract. Defendant himself says so.

VI.

If it is assumed that it was a mistake adverse to defendant Kostelac, he would then be entitled to demand rescission or reformation. Rescission would have been applicable if the mistake was such that there was never a meeting of minds in the contract sense. Reformation would have been applicable if the mistake was in putting down in the contract what their minds had met upon. Rescission completely sets aside the instrument on the theory there never was a contract between the parties through either mistake or some other reasons.

VII.

In this instance, defendant Kostelac did not demand either rescission or reformation. What he

sought in effect was renegotiation which was a matter for the administrative judgment and discretion of the Army authorities and not a matter for the court. It is not within the province of the court to renegotiate a contract for these parties. If defendant Kostelac, on the other hand, had taken the position promptly and within a reasonable time that there was no contract at all because of the alleged mistake, and had then demanded that the contract be declared at an end and that he be freed of its obligations, it is quite possible that such demand might have been accepted at that time, because within a few days of the letting of the contract other arrangements for the collection of the garbage could readily have been made with some of the other bidders on the same contract, who at that time, presumably, were in business set up and ready to take on the responsibilities of collecting garbage at the Fort. DeBoer, for example, had his organization, his farm and swine, his workers, his equipment, and so on, and had that rescission occurred in all likelihood a new arrangement for the collection of the garbage could have been made with little, if any, damage to anyone. Kostelac, however, did not take that position. He continued with performing under the contract, or at least performing the garbage collection responsibilities required under the contract, all the while claiming and asserting that there ought to be a different basis for compensation for the garbage; accordingly, remedies, now sought, are not available.

VIII.

Reformation was never in order. There was no putting down of figures, which should have, for example, been five instead of ten.

IX.

The foregoing observations bring attention down to the proposition that without demanding rescission or reformation which, of course, was never applicable anyway, but at most asserting renegotiation which was refused ultimately by the Army authorities, defendant Kostelac continued with the collection of the garbage until December 15, 1946, and the Court feels obliged to hold that in doing so this collection was under the contract which had not been rescinded and which Kostelac had not asked to be rescinded. Accordingly, the garbage collected during that period must be paid for according to the terms of the contract which, as appears from Exhibit No. 3, is in the amount of $24,261.16, being for the period July 1 to December 15, 1946.

X.

It is probable that a rigid and narrow view of the matter would require that further damage be awarded, as demanded by the Government, but the Court does not feel obliged to take such a view under the peculiar circumstances of this case. It seems to the Court that Kostelac might well have secured appropriate relief by rescission had he promptly sought it, that there may well have been a substantial and important mistake as to the quan-

tity of garbage that might be expected from the Fort, so that while I find and hold that Kostelac, who, by the way, had the benefit of counsel at this time, did not proceed as required under the law of contracts, the Court is persuaded that under the circumstances no further damages should be allowed and that interest should run from the date of the Certificate of Indebtedness, namely, January 16, 1952, rather than from the earlier period.

XI.

Interest on the awarded sum of $24,261.16 should run at the legal rate, to wit, six per cent (6%) per annum from January 16, 1952, the date of the Comptroller's Certificate of Indebtedness, rather than from the original expiration date of the contract of July 1, 1951, as asked by the plaintiff.

XII.

The Court is fully satisfied without expatiating on it, that this liability of Kostelac is within the intent and purpose of the bond when its provisions are considered and construed as a whole in the light of the circumstances under which the bond was given, and, accordingly, judgment should run against the bondsman as well as the principal, Kostelac.

XIII.

The further question of the effect upon the contract of a later reduction in military personnel does not call for consideration in the premises.

From the foregoing Findings of Fact, the Court now concludes:

Conclusions of Law

I.

The Court has jurisdiction of the subject matter of this action and of the parties hereto.

II.

The plaintiff is entitled to judgment herein against the defendants, Mike H. Kostelac and Maryland Casualty Company, jointly and severally, in the sum of $24,261.16, together with interest thereon at the rate of six per cent (6%) per annum from January 16, 1952, to date of judgment, and for its costs herein, and judgment should be entered in accordance herewith, and bear interest at said rate.

The defendants, by counsel, have excepted to each and every adverse finding of fact and conclusion of law by the Court, hereinabove set forth, and said exceptions are hereby allowed.

Done in open Court this 22nd day of June, 1956.

/s/ GEO. H. BOLDT,
United States District Judge.

Approved as to form only, and Notice of Entry Waived, and receipt of copy hereof acknowledged this 22nd day of June, 1956.

/s/ GEORGE M. HARTUNG, JR.,
Of Attorneys for Defendants

Presented by:

/s/ GUY A. B. DOVELL,
Assistant United States
Attorney.

Lodged June 12, 1956.

[Endorsed]: Filed June 22, 1956.

United States District Court, Western District of Washington, Southern Division

No. 1581

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MIKE H. KOSTELAC and MARYLAND CASUALTY COMPANY, a Corporation,

Defendants.

JUDGMENT

This cause coming on regularly for trial on the 4th day of June, 1956, before the Court, sitting without a jury, plaintiff appearing by its attorneys, Charles P. Moriarty, United States Attorney for the Western District of Washington, and Guy A. B. Dovell, Assistant United States Attorney for said

District, and the defendants appearing by their counsel, E. H. Tenney, Jr., of Tenney, Dahman & Smith, of St. Louis, Missouri, and by George M. Hartung, Jr., of Eisenhower, Hunter, Ramsdell & Duncan, local attorneys for the defendants; evidence, both oral and documentary, having been introduced, briefs having been submitted and oral arguments having been made, and the cause submitted for decision upon the law and the evidence, and the Pretrial Order theretofore entered and the issues presented thereby; and the Court having considered the same and being fully advised in the premises, and having heretofore on June 5, 1956, announced its decision orally, and consonant therewith having heretofore on this day made and entered its Findings of Fact and Conclusions of Law wherefrom it appears that the plaintiff is entitled to recover judgment against the defendants on its claim herein, with interest and costs; it is now, therefore,

Ordered, Adjudged and Decreed that the plaintiff, United States of America, do have and recover judgment against the defendants, Mike H. Kostelac and Maryland Casualty Company, jointly and severally, in the amount of $24,261.16, together with interest thereon at the legal rate of 6% per annum from January 16, 1952, to date of this judgment, amounting to $6,455.02, and making a total of $30,716.18, principal and interest to date, and that plaintiff recover its costs herein to be taxed.

The defendants, by counsel, have excepted to each and every adverse ruling of the Court, hereinabove set forth, and said exceptions are hereby allowed.

Done in open court this 22nd day of June, 1956.

/s/ GEO. H. BOLDT,
United States District Judge.

Approved as to Form only and Notice of Entry Waived and Receipt of Copy Hereof Acknowledged this 22nd day of June, 1956.

/s/ GEORGE N. HARTUNG, JR.,
Of Attorneys for Defendants.

Presented by:

/s/ GUY A. B. DOVELL,
Assistant United States Attorney.

Lodged June 12, 1956.

[Endorsed]: Filed and entered June 22, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE NINTH CIRCUIT COURT OF APPEALS

Notice is hereby given that Mike H. Kostelac and Maryland Casualty Company, a corporation, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from

the final judgment entered in this action of June 22, 1956.

EISENHOWER, HUNTER,
RAMSDELL & DUNCAN,

By /s/ GEORGE N. HARTUNG, JR.,
TENNEY, DAHMAN & SMITH,

By /s/ E. H. TENNEY, JR.,
Attorneys for Appellants Mike H. Kostelac and Maryland Casualty Company, a Corporation.

Receipt of copy acknowledged.

[Endorsed]: Filed August 7, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America, plaintiff, above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in the above-entitled action on June 22, 1956, insofar as it does not grant the plaintiff recovery against the defendant, Mike H. Kostelac, in the full sum of $104,363.40, with interest thereon at the legal rate from July 1, 1951, and against the defendant, Maryland Casualty Company, in the full sum of $40,000, with interest thereon at the legal rate from July 1, 1951, as prayed for in its Complaint.

Dated this 16th day of August, 1956.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ GUY A. B. DOVELL,
Assistant United States Attorney, Attorneys for Appellant, United States of America.

Receipt of copy acknowledged.

[Endorsed]: Filed August 16, 1956.

In the District Court of the United States for the Western District of Washington, Southern Division

No. 1581

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MIKE H. KOSTELAC and MARYLAND CASUALTY COMPANY, a Corporation,
Defendants.

TRANSCRIPT OF PROCEEDINGS

Transcript of Proceedings in the above-entitled and numbered cause in the above-entitled court, before the Honorable George H. Boldt, United States District Judge, commencing at 10:00 o'clock a.m., June 4, 1956, at Tacoma, Washington.

Appearances:

On Behalf of the Plaintiff:
MR. GUY A. B. DOVELL,
Assistant United States Attorney,
Federal Courthouse,
Tacoma, Washington.

On Behalf of the Defendants:
MR. GEORGE N. HARTUNG,
EISENHOWER, HUNTER, RAMSDELL and DUNCAN,
Puget Sound Bank Building,
Tacoma, Washington.
MR. EDWARD TENNY,
TENNY, DAHMAN and SMITH,
506 Olive Street,
St. Louis 1, Missouri.

The Court: No. 1581, United States vs. Kostelac. Are you ready?

Mr. Hartung: Ready, your Honor.

Mr. Tenny: Ready, your Honor.

The Court: Go ahead.

Mr. Dovell: Your Honor, this case is one of long standing with the garbage contract at Fort Lewis. The pretrial order in this case has been entered on the 9th day of December, 1955, and it admits the Government's case in chief with the exception that the exhibits are lodged with the Clerk, and we offer those at this time, if there is no objection, pursuant to the pretrial order.

Mr. Tenny: We have no objection to the exhibits.

The Court: All right. The exhibits referred to in the pretrial order numbered as the Clerk will indicate——

The Clerk: Plaintiff's Exhibits 1 to 5, inclusive, your Honor.

The Court: These exhibits are admitted in evidence.

(Thereupon, Plaintiff's Exhibits Nos. 1 to 5, inclusive, for identification were admitted into evidence.)

The Court: Will you briefly tell me what each one of these is, please?

Mr. Dovell: Exhibit 1 is a copy of the Government's garbage contract with Mike Kostelac which is the bid dated [2*] June the 26th of '46 and accepted June 29th. That is contract W-45016SC-19S-497, and attached to that exhibit is a copy of the bid bond, or former bid bond, entitled "Standard Government Form Bid Bond," dated June 26, made by Mike H. Kostelac as principal and Maryland Casualty Company as surety.

Exhibit 2 is the replacing garbage contract with John DeBoer made December 13, 1946, consisting of his bid, dated December 13, and Government's acceptance in the same date.

Exhibit No. 3 is a copy of the order of the account between the plaintiff and defendant made by the Comptroller General of the United States.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Exhibit No. 4 is a photostatic copy of a letter dated December 27, 1946, from the Contracting Officer at Fort Lewis relative to the defaulting contract and addressed to Mike H. Kostelac.

Exhibit No. 5 is a photostatic copy of the same letter dated November 27 of '46 from the Contracting Officer at Fort Lewis relative to the contract, and that one is addressed to Maryland Casualty Company as surety.

They are the exhibits that I offer, your Honor, and that is the Government's case in chief.

The Court: All right. You rest then?

Mr. Dovell: Yes, your Honor.

Mr. Tenny: If the Court please, for the record I believe it is appropriate at this time for us to file a motion [3] to dismiss on certain technical grounds which I would like to discuss later, if I may, and if I may have leave to file.

The Court: Just state the grounds and then you can argue the whole case in one bundle.

Mr. Tenny: Yes. If the Court please, the grounds for our motion to dismiss at this time at the close of the plaintiff's case—there are two grounds: First, that under the evidence which includes the Comptroller General's auditor's account which has been stipulated to, under that evidence the number of men at Fort Lewis so greatly diminished over the period of the actual contract after Mr. Kostelac's alleged default to such an extreme extent that under the law we believe the contract automatically becomes unenforcible and

the defendant is automatically by law relieved of damages.

Our second grounds for the motion to dismiss at this time is the fact that the big bond which is in evidence as a part of Exhibit No. 1, I believe it is of the pretrial order, that bid bond by its very terms sets certain conditions for liability and sets out the measure of damage. The fact is that the stipulated facts in the pretrial order conclusively show those conditions have not been met because of the wording of the bond, and it is our contention that under the law they have not proved the wording of the bond which requires the reletting of the contract, what we call the DeBoer contract, for a higher price than the Kostelac Contract, and the evidence [4] shows it was at a lower price.

The Court: Very well. I will hear you most fully on your motion at a later time, and at this time ruling on the motion will be reserved.

Mr. Tenny: I would like to make a brief opening statement as to our defense in this case.

The Court: You may.

Mr. Tenny: The defense of the defendant Kostelac, one of the two defendants, the other being the bonding company, is that this contract on which suit is brought was entered into by mutual mistake of the parties. If not by mutual mistake then by a mistake which has the same legal significance which might or might not be considered a unilateral mistake.

The mistake was this, and our evidence will show that Mr. Kostelac was invited and requested both

in writing and verbally by the Contracting Officer at Fort Lewis before bidding on the contract to go out first and look at the garbage containers to determine for himself how much garbage he could expect to find, and on the basis of what his examination showed and on the basis of his own knowledge, of course, make his bid not so much per ton for garbage but so much per man per month at Fort Lewis. This whole problem, of course, would not have arisen if Mr. Kostelac had bid five or ten dollars a ton, for example, because he would know exactly how much he was paying [5] for each ton of garbage.

Because of the type of contract desired, and it was certainly a nice type of arrangement for operating, instead of weighing garbage every day and every load, Mr. Kostelac would take his chance on how much garbage there might be as a result of having some men at Fort Lewis bid so much per man per month and take his chance on it. We have no contention that this may not vary over the period of the contract, but we do contend this, that the original price bid by Mr. Kostelac, and this was in June of 1946 that the contract was entered into, as a result of a very serious error which is admitted in the pretrial order and in the proof, as a result of that there was not the honest contracting between the parties that is required in a court of equity in order to have it an enforcible contract. We attack the original entering into of the contract in this case and we do not attack any changes thereafter.

It is our contention that on the basis of the evidence in this case the contract should be rescinded and there should be no liability thereunder.

We have a plan of proof that I would like to call to the attention of the court. In our proof, first of all, we will show from the agreed statement in the pretrial order that it was the Contracting Officer himself who asked the defendant to go there, that the Government participated by asking in [6] writing and verbally that the defendant look over this evidence and decide for himself. From the pretrial order we will also show that the contracting officer made a mistake. It is stipulated that the Contract Officer thought the garbage cans contained a one-day accumulation at that time and that in sending Mr. Kostelac out there the contracting officer himself was acting under a mistake.

Third, from the pretrial stipulated facts we will show that the contracting officer pointed out to Mr. Kostelac the importance of examining these particular containers in setting his price and told him that it was necessary to examine these in order that he could estimate what the bid under the contract should be, and this importance was brought out to the defendant directly by a conversation between the two contracting parties.

The next sequence in the proof, your Honor, on behalf of the defendant, would, of course, be to prove that the garbage in those containers was not a one-day accumulation. The pretrial stipulation did not in our opinion adequately cover this point. It merely said that there may have been a one-day

—more than a one-day accumulation, or there were some complaints made at Fort Lewis that garbage from some of the messhalls was not carried away every day. However, after the pretrial stipulation was signed just a few weeks ago, we felt that it was not sufficient for the burden which the [7] defendant has in this case to try to set aside a solemn contract, and we felt that it was incumbent upon us to prove more completely and fully the question of whether or not Mike Kostelac was actually misled by those garbage cans. We had previously asked the Government by interrogatories to furnish us the names of witnesses at Fort Lewis who were familiar with this fact. In fact, we had even filed a motion to require an answer to the interrogatories when we were told that they had no such witnesses.

The Government later amended its answer to the interrogatories and gave us, I think this was about a year ago, the names of five high officers at Fort Lewis during June of 1946 when the alleged mistake took place.

So, after the pretrial stipulation was signed in this case we went up to Chicago and contacted the man who was at the top of the list, a Lieutenant Colonel who was in charge of the entire matter at Fort Lewis, and as a result of contacting him we issued interrogatories to him which were served on the Government. The Government in turn made out counter—rather, cross-interrogatories to this Lieutenant Colonel Ryer in Chicago and we issued

several redirect interrogatories to rephrase some questions.

We think, your Honor, that on this sequence of our proof that we have conclusively shown that—well, by the depositions that the garbage was not picked up every day at Fort Lewis, [8] that the garbage in the containers in question was not a one-day accumulation of garbage but was an accumulation of more than one day, probably two days, that therefore Mr. Kostelac was misled in estimating the amount of garbage he could expect and the price he would pay, of course, and that leaves just one sequence, I think, in our proof, your Honor, and that is that we must, of course, show that Mike Kostelac personally acted upon the mistake to his detriment, that he was personally actually misled.

Mr. Kostelac has come up here with me from St. Louis to testify and our evidence will be directly from the defendant Kostelac himself.

I just wanted to mention one other point in this connection. I think that is logically our proof but we hope to prove also by Mr. Kostelac that as soon as he discovered that he had made a mistake he promptly took every step that he possibly could to try and correct it; that he left no stone unturned, whether here in Tacoma or in San Francisco where the Sixth Army Headquarters was, or in Washington, D. C., where the highest echelon was, that he made numerous trips at very considerable expense to attempt to get this contract either corrected or

to get him out of what looked like a pretty bad legal technicality.

He was entirely unsuccessful, and the evidence and the stipulated facts show that in December of 1946, about four and [9] a half months after he started under the contract he was notified by the contracting officer that the contract would be relet to someone else, which was Mr. DeBore, who thereafter carried on the garbage contract at Fort Lewis.

Mr. Kostelac never paid for the garbage, and the evidence will show he never was given an opportunity to pay anything except the price which he contended was entered into under a mistake. In this case, your Honor, we have withdrawn one of the issues that was previously discussed on the summary judgment motion, the issue of whether or not the Seattle Stock Market conformed to the requirements of the contract as a part of the give and take. In the pretrial order we have completely eliminated that issue from the case.

We have two other issues which I mentioned a moment ago on a motion to dismiss or for a directed verdict, and those two will not require evidence. They are purely matters of law.

The Court: All right. Put on your proof.

Mr. Dovell: I would like to make one correction. The pretrial order was entered in—it was May the 11th of 1946 is the date. That is the proper date.

Mr. Tenny: May the 11th?

Mr. Dovell: Yes.

The Court: Yes.

Mr. Tenny: Did I say differently? [10]

The Court: No. He said something about it being last December. Go ahead, Mr. Tenny.

Mr. Tenny: The first item of proof, your Honor, for the defendant, I would like to read to the court just two short sentences from Exhibit No. 1 which is the actual contract of this case.

The Court: All right. You may do so.

Mr. Tenny: First of all, the general provisions of the contract which are the small printed provisions, in general provision No. 5, there is contained the following statement, "Inspection: Bidders are invited and urged to inspect the property to be sold prior to submitting bids. Property will be available for inspection at the time specified in the invitation. No labor will be furnished for such purpose. In no case will failure to inspect be considered grounds for a claim."

Then, on the very first page of the contract in typewriter, paragraph No. 3 of the formal invitation of that the Government has the following statement, "Inspection dates," and then there is reference, "See general Provision 5," which I just read. There is typed in there, "June 21 to June 26 between the hours of 8:00 to 4:30 p.m. daily except Saturday and Sunday," and that is June 21 and 26, and up above it shows "1946."

Next, your Honor, I would like to read briefly from three [11] portions of the pretrial stipulation in this case. The first is on page 6 of the pretrial stipulation, paragraph 16, lines 15 to 20, breaking into the middle of a sentence here, "that the

contracting officer for plaintiff stated to defendant Kostelac prior to his bidding on the contract that the waste or garbage in said containers should represent a one-day's accumulation thereof." Then on the page before that, page 5, lines 9 to 14, which is in paragraph 15, "that in suggesting such inspection by defendant Kostelac the contracting officer had no personal knowledge that garbage and kitchen waste were not being picked up daily from the messes referred to in said contract, and said invitation to inspect, and he personally assumed that such garbage and kitchen wastes were being picked up daily as required in the written contract." Then on page 6 again, on the next page, lines 21 to 26, in paragraph 17, "That the inspection of said containers for garbage was considered by the contracting officer for plaintiff an important procedure and step prior to letting the aforesaid contract in order to estimate the probable amount of garbage under existing conditions, practices, and procedures, and defendant Kostelac was advised by the contracting officer of the importance of such inspection."

Your Honor, the defendants would next like to read the interrogatories of Colonel Ryer, and with the Court's permission I would like Mr. Hartung to sit on the witness stand and [12] answer them.

The Court: That will be a convenient way of doing it.

Mr. Tenny: I might add that we hereby withdraw all objections to the cross-interrogatories which were previously filed.

The Court: Very well.

Mr. Dovell: The objections to the interrogatories by the Government are still in order, your Honor.

The Court: All right. When do you want me to rule on those objections?

Mr. Dovell: We might as well take them up at this time.

Mr. Tenny: If it is agreeable with the Court I would prefer at the time we read them because I think perhaps the preceding question would show whether or not they are leading. I think the objection is to leading questions.

The Court: That perhaps will be desirable. After all, this is a non-jury case.

Mr. Dovell: Interrogatories 6 and 14.

The Court: I will be on the lookout when we come to those.

Mr. Tenny: This is not exactly a question, but I think I might read the full name of the witness as shown on the sworn deposition at the top. [13]

The Court: Go ahead.

Mr. Tenny: "Lieutenant Colonel Robert Ryer, III, Army Serial Number 0474134, Det. 1, 9111th Technical Service, United Food and Container Institute School, 1819 Pershing, Chicago, Illinois.

Q. Were you stationed in the United States Army at Fort Lewis, Washington, during the entire month of June, 1946?

A. Yes. Might I state, sir, I have corrected on my written interrogatories my serial number. My present serial number is O-31252. I am stationed

with the Det. 1, 9111th, QMC, Food and Container Institute for Armed Forces.

Q. Please state the position you held"—pardon me. May I start over, your Honor?

The Court: Yes.

Mr. Tenny: "Q. Were you stationed in the United States Army at Fort Lewis, Washington, during the entire month of June, 1946?

A. Yes.

Q. Please state the position you held at said Post.

A. Post Food Service Supervisor.

Q. Please describe your duties, particularly with reference to any duties, if any, that would cause you to examine garbage containers at messhalls at Fort Lewis. **[14]**

A. Part of this assignment required me to inspect at Fort Lewis the messhalls. An integral part of this inspection of messhalls required me to examine the garbage containers at messhalls at Fort Lewis.

Q. During the month of June, 1946, did you personally receive any complaints from mess sergeants or other persons in charge of messhalls at Fort Lewis, based upon a contention that garbage containers had not been emptied? A. Yes.

Q. Were you during said month personally in charge of receiving and investigating complaints of this nature at Fort Lewis? A. Yes."

Mr. Tenny: I believe this next question, your Honor, is objected to.

"Q. According to your best present recollection,

were such complaints at Fort Lewis received as frequently as every other day during said month?"

Mr. Dovell: That is objected to, your Honor, on the grounds that the question is obviously calculated to produce the exact answer desired by the interrogator.

The Court: There is no doubt that in a certain sense it is leading. In fact, there isn't any doubt that it is leading in any sense. However, that objection does not always necessarily rule out consideration of the response. [15] I will take that into account in weighing the response. I will overrule the objection. Go ahead.

"A. Yes. This is an average figure for a protracted period of time.

Q. Did you personally go to the messhalls at Fort Lewis and investigate such complaints during said month? A. Yes.

Q. At said time and places did you personally examine the garbage containers at messhalls in such cases? A. Yes.

Q. Did you personally dig into and poke into the garbage in making such examinations at Fort Lewis during said month? A. Yes.

Q. Was it or was it not, aside from the above investigations also a part of your duty to inspect the messhalls at Fort Lewis during said month?

A. Yes.

Q. If so, did you also inspect the garbage containers at the messhalls at Fort Lewis during said month as a part of such duty? A. Yes.

Q. Approximately how many hours, if any, per

day did you spend on the average in examining such messhalls during said month at said places, according to your best present recollection? [16]

A. Four hours.

Q. Was John DeBoer the man who picked up garbage at Fort Lewis during the month of June, 1946?

A. I do not remember with certainty. It could have been. The name is familiar."

Mr. Tenny: This next question is objected to also.

"Q. On the basis of your personal experience in the matters referred to above, and on the basis of your own personal observations at Fort Lewis, Washington, during the month of June, 1946, please state, according to your best personal recollection, whether or not Mr. DeBoer made daily pickups of garbage at the messhalls at Fort Lewis during the month of June, 1946."

Mr. Dovell: That is objected to on the grounds that it calls for a conclusion of the witness and the witness has not been shown to be competent to testify thereto, and there is no evidence that he had such opportunity to observe the activity of the matter in question. The further ground that it is leading and obviously designed to produce an answer without proper foundation for the opinion of the witness in accordance with the claims, charges, and contentions of the defendant Kostelac.

The Court: I will take into account these objections in weighing the evidence, but I will overrule the objection.

"A. The garbage was not picked up daily. If Mr. DeBoer [17] was the driver then he did not do so."

Mr. Tenny: Next we have the cross-interrogatories. Would you prefer to read those?

Mr. Dovell: "Q. If you have stated on Direct Examination that you were not Post Food Service Supervisor during the month of June, 1946, at Fort Lewis, and that your office was in charge of complaints at that time from messhalls at Fort Lewis, then please answer the following:

(a) What was the nature of these complaints?

A. Generally that garbage had not been picked up.

(b) Upon receipt of the same, what action was taken by you or under your direction in processing these complaints?

A. Make inspections to ascertain the reason for the garbage not being picked up and having to the best of my ability fixed the responsibility issued necessary instructions to party in error to correct the error.

(c) What record, if any, was made of these complaints and/or of their investigation?

A. No permanent record was made.

(d) What reports, if any, were made following their investigation and with what officers were they lodged?

A. Reports were only rendered on recurring situations. When messhall personnel were at fault these were verbal reports to the appropriate unit commander for corrective action. If apparent that

contractors were at fault, [18] reports were made to the salvage officer.

(c) If you have not in your preceding answer covered it, state whether or not any of these complaints or investigations or reports were ever referred to the Disposal Office, now known as the Salvage Office, and if not, why not?

A. Please see second part to answer above.

2. Q. If you have stated that you personally inspected garbage containers, then please state your answers to the following:

(a) Did or did not there appear to be sufficient number of containers at each messhall? In your answer please give estimates of size and number of containers on the average of each messhall.

A. Generally, yes. For edible garbage two 32 galvanized GI cans at the rear of each messhall.

(b) Was your personal inspection confined to containers at messhalls from which you received complaints? A. No.

(c) How many containers did you inspect on the average each day?

A. Sixteen. This is an average figure for a protracted period.

(d) In what part or parts of Fort Lewis did you make your personal inspection? [19]

A. Entire Fort.

(e) Please state whether or not in your personal inspection you found any extraneous matter such as glass bottles, broken glass, coffee grounds, or any other matter not suitable for hog feed, and if so, what action did you take in such case?

A. Sometimes this was the case. See answer to 1(b) above.

(f) Please state whether or not the garbage collector was supposed to gather garbage containing such extraneous matter? A. No.

3. State whether on not any of the containers personally inspected by you had the appearance to you of more than one day's accumulation of garbage? A. Yes.

4. If your answer to the preceding question is in the affirmative, please describe:

(a) Upon what facts do you base your estimate of the appearance of such garbage?

A. From having at that time inspected many garbage cans over a period of several years in the capacity as Nutrition Officer, Sanitary Officer, and Food Service Officer.

(b) State whether or not such facts would be so apparent [20] that anyone who examined such containers could tell the same?

A. No. One needs some experience.

5. State whether or not complaints with respect to delayed service reached your office from all of the messhalls or whether or not they were generally confined to messhalls from a certain particular locality of the Fort?

A. Yes. From all the Fort.

6. State whether or not you remained stationed at Fort Lewis during the next succeeding months in 1946. A. Yes.

7. Were you aware of an investigation conducted by the Army at Fort Lewis during the

months of June, July and August—" strike out that "June"—"1946, after complaint made by Kostelac to determine whether or not daily pick-ups had actually been made.

A. I recall there was some difficulty with the contract concerning collection of garbage.

8. If your answer to the preceding question is in the affirmative, please state whether or not you were ever contacted in such investigation with reference to the subject therein mentioned?

A. I believe I was.

9. Were you later advised of the results of the investigation mentioned in questions 7 and 8 herein above? [21] A. I must have been.

10. If you were advised of the results of the Army's official investigation referred to in the preceding question, please state for the record the purport of the same.

A. The Government would oblige the contractor to fulfil his contract.

11. To the best of your recollection, did any of the prospective bidders at the time of letting new garbage contract at Fort Lewis in June, 1946, contact your office with respect to the inspection of garbage pursuant to the invitation and request that bidders inspect the amount of garbage before bidding?

A. I do not recall discussing with any of the prospective contractors questions pertinent to the quantities of garbage generated at messhalls at Fort Lewis.

12. If your answer to the preceding question is

in the affirmative, do you recall whether or not Mike H. Kostelac, the successful bidder at that time, was one who did contact your office in the matter of inspection, and if so, what information, if any, was furnished him by you or your office at such time with respect to amount of garbage, daily pick-ups, and related matters? Please state the substance of any information so furnished him.

A. No." [22]

Mr. Dovell: That concludes the cross-Interrogatories, your Honor. As to the redirect interrogatories, they were not served on us. However, they cover the same matter, and if the same objection is obtained why we have no objection to that being read.

The Court: All right.

Mr. Tenny: Those are rephrasing those two that were objected to. "Even though you may have heretofore answered this question, please state about how frequently or how many times per month you received the complaints, if any, referred to in the original interrogatory number 4 of the defendants herein.

A. Every other day or about fifteen times a month.

Q. Even though you may have answered this question before, please state on the basis of your own personal experience in observing the operation of the messhalls, and in observing the actual garbage containers, whether or not, according to your best present recollection, the garbage containers at

the messhalls at Fort Lewis during the month of June, 1946, were emptied daily?

A. No, they were not."

Mr. Tenny: Your Honor, there are two very short stipulations in the pretrial order that I would also like to read at this time that I should have read a moment ago.

The Court: Go ahead. [23]

Mr. Tenny: Page 6 of the pretrial order, beginning on line 4, breaking into the middle of a sentence—"that the Government admits that it may be the fact that all the garbage was not picked up every day at the time and place in question." Then on at the end of page 5 and going over into page 6, I don't have the exact line. It is right at the bottom. "—that prior to the time that defendant Kostelac inspected the garbage containers as aforesaid, there had been some complaint at Fort Lewis that all garbage was not picked up every day at certain messhalls, and the Government was not informed as to when these complaints were made."

Mr. Kostelac, would take the witness stand, please.

The Court: I think that might be of some length, and while we have had a rather short session I think perhaps we ought to have a little break now at this point. That will avoid your breaking up the examination of this witness. Recess for fifteen minutes.

(Thereupon, a short recess was taken.)

The Court: You may proceed. [24]

MIKE HENRY KOSTELAC

one of the defendants herein, called as a witness by and on his own behalf, being first duly sworn, was examined and testified:

The Clerk: State your full name and spell your last name.

The Witness: Mike Henry Kostelac.

By Mr. Tenny:

Q. Where do you live, Mr. Kostelac?

A. Belleville, Illinois.

Q. Is that near St. Louis? A. That's right.

Q. How long have you lived there?

A. Since '27, except a few years that I lived here.

Q. When did you live near Tacoma?

A. Well, it was in '56, early '56.

Q. Do you mean '46 or '46? A. '46.

Q. And where did you live at that time?

A. I lived when I first come here, I lived in Spanaway, Washington.

Q. Spanaway? A. That's right.

Q. And did you have a farm there?

A. At that time?

Q. Yes. [25] A. Later on I had a farm.

Q. When did you have a farm?

A. '46—June of '45.

Q. 1945?

A. I came in '45. That was a mistake, not in '46.

Q. Did you own the farm or rent it?

A. I leased it.

(Testimony of Mike Henry Kostelac.)

Q. And where was that farm?

A. Gig Harbor.

Q. Did you before you had any contract with Fort Lewis have a contract to remove garbage from any other installation?

A. Yes, at Bremerton, Washington.

Q. What installation was that?

A. The Navy Shipyard.

Q. The entire Bremerton Navy Shipyard?

A. The entire Naval Base, whatever you call it.

Q. When did that contract run?

A. '45 to '46.

Q. And what month of 1945 to '46?

A. July 1st.

Q. And that contract covered a span leading right up to your proposed contract at Fort Lewis, did it? A. That is right.

Q. Will you tell the court approximately how much garbage you removed in the Bremerton Navy Yard? [26]

A. Oh, it varied from twenty to forty or fifty ton a day.

Q. And did you have your own trucks to pick that up, or not? A. Yes, sir.

Q. What did you do with that garbage?

A. Fed it to the hogs.

Q. At your farm at Gig Harbor?

A. That's right.

Q. And did you do that through the entire year from the 1st of July, 1945, to the end of June, 1946?

A. Yes.

(Testimony of Mike Henry Kostelac.)

Q. And did you have your own hogs on this farm, or not? A. Yes.

Q. Will you tell the court approximately how many hogs you had at the time at the top point?

A. Eight thousand. About eight thousand.

Q. And how low would that go to?

A. Well, what do you mean by that?

Q. Eight thousand is your top figure, is it?

A. Oh, it sometimes I had them down as low as—I wouldn't have as much when I would get twenty ton. I would have maybe twenty-five hundred. If the garbage would be slipping down a little I would sell them. [27]

Q. Could you sell your hogs to even them up, more or less, depending on the amount of garbage?

A. On the amount of garbage.

Q. Did that vary in your Bremerton contract also? A. It did.

Q. Had you had experience before that Bremerton contract on collecting garbage and feeding hogs? A. Yes, sir.

Q. Where was that? A. In St. Louis.

Q. And what garbage did you pick up there?

A. Scott Field Air Base.

Q. At Belleville, Illinois?

A. Scott Air Field and Jefferson Barracks in St. Louis. And there is a Navy Base there, too, a small one.

Q. Did you pick up all the garbage at those places, or was it just part of it? A. All of it.

Q. And for how long a period of time?

(Testimony of Mike Henry Kostelac.)

A. Two years at Jefferson Barracks and one year at Scott Air Base.

Q. And how much later, then, did you come here to Tacoma? A. Right after that.

Q. Right after those contracts?

A. No, I had a few—I had a couple bone and grease [28] contracts a year before that.

Q. Bone and grease? A. That's right.

Q. Was that rendering the fat, or what?

A. That's right.

Q. Did you before June of 1946 ever contact anyone at Fort Lewis in regard to the possibility of getting a contract there for hauling away garbage?

A. Major Maiorano.

Q. How long before June of 1946 did you first contact them?

A. I contacted him a year before.

Q. And what did you contact him about?

A. About the bid for garbage.

Q. Did you ask him to let you bid on it?

A. Yes.

Q. Were you given any invitations to bid before 1946? A. Yes.

Q. When was that? A. I think in '45.

Q. About the same time in 1945?

A. That's right, in June.

Q. Did you put in a bid at that time?

A. Yes, I did.

Q. Were you successful or not? [29]

A. I was not.

Q. Who was the successful bidder at that time?

(Testimony of Mike Henry Kostelac.)

A. John DeBoer.

Q. D-e-B-o-e-r?

A. I wouldn't know how to spell it.

Q. Did you later on, then, receive an invitation from anyone at Fort Lewis to bid in 1946?

A, Yes, sir; I did.

Q. About when was that?

A. Early June. I think it was sometime in June.

Q. You think this was the early part of the month? A. Early part of June.

Q. Will you tell the court—did you bid at that time early in June? A. That is right.

Q. What kind of a bid did you submit, a fixed price?

A. Well, it was a bid—it had three parts in it, by the man a month, so much a man a month on a sliding scale, and so much a ton.

Q. Do you recall approximately what you bid per ton at that time?

A. About four to five dollars a ton.

Q. And was that bid accepted?

A. It was not, not the ton basis.

Q. Were any of those three bids in the early part of [30] June accepted by the Government?

A. Not my bid.

Q. Not your bid? A. No.

Q. Did they accept someone else's bid?

A. John DeBoer.

Q. Did he get the contract at that time?

(Testimony of Mike Henry Kostelac.)

A. No, he didn't.

Q. Will you tell the court what happened?

A. Well, we had a meeting and Major Mairoano asked DeBoer if it was all right with him if he would——

Q. Well, without going into too much detail.

A. That is the way I can explain it. He said if he could promise he would bid again on another bid they would open the bids the second time. If not, they was going to give it to me.

Q. Were they talking about a different period contract besides a one-year contract?

A. Five-year contract.

Q. In other words, they first were talking about a one-year contract, were they, and they talked about a five-year contract? A. That is right.

Q. Thereafter, later on in June did you get another invitation from the Government? [31]

A. Yes, sir; I did.

Q. And is that the invitation that is in evidence here, and the contract we are now talking about?

A. That's right.

Q. That was later in June, June the 26th, was it? A. That is right.

Q. Mr. Kostelac, will you tell us what you did after you got that invitation in the early part of June in respect to whether you examined any garbage cans?

A. When I first got my invitation to bid, I inspected the garbage containers at different messhalls to see how much garbage they had.

Q. How did you proceed? What time of day?

(Testimony of Mike Henry Kostelac.)

A. Just ahead of the garbage truck?

Q. Was that in the morning or afternoon?

A. Morning.

Q. And how far ahead of the garbage truck were you?

A. Oh, seven or eight messhalls ahead.

Q. So you went there just before the truck came?

A. The truck was right behind me.

Q. And did you talk to anyone at the messhalls, or not? A. I did.

Q. And who did you talk to?

A. The mess sergeants.

Q. What did you ask them? [32]

A. How many men they fed in each mess, at that particular mess.

Q. Then, after you found out the number of men what did you do?

A. Then I looked at the garbage cans to see how full they were.

Q. What did you find in looking at the garbage containers?

A. Oh, there had been more than a pound a day for each man fed at the messhall.

Q. How did you figure out by looking at Garbage cans there would be about a pound a man a day?

A. Well, I have had experience over twenty years in handling garbage.

Q. And did you feel the weight of it, or what?

(Testimony of Mike Henry Kostelac.)

A. Well, I just leaned the can over. I didn't dig into it.

Q. And do you know the approximate weight of those garbage cans? A. I do.

Q. How much do they weigh when they are full?

A. About two hundred pounds. It varies according to the kind of garbage.

Q. Does it make a difference, then, there if there is dry garbage or—— [33]

A. Liquid or dry garbage.

Q. Does it make a difference what time of the year it is, whether there are canteloupes and so forth?

A. That is right. Green vegetables and everything makes a difference.

Q. Did you take all those matters into consideration when you decided what you thought the amount of garbage per man was? A. I did.

Q. And about how many of those messhall garbage cans did you examine at that time?

A. Oh, fifteen or twenty in each section. I imagine over forty or fifty.

Q. How many principle sections were there at Fort Lewis?

A. I believe there is four—three four or five. I don't remember.

Q. In examining all of them did you or did you not go ahead of the garbage truck?

A. That is right, always.

Q. About how many garbage cans were there at the messhalls?

(Testimony of Mike Henry Kostelac.)

A. About two. It all depends on how big the messhall was. The larger ones have more. Some would have more and some would have different sized cans. [34]

Q. Did the Contracting Officer, Major Mairoano ever go with you on those inspections?

A. No, he didn't.

Q. Did you talk to him personally before or after the inspections? A. Yes, I did.

Q. Was it before or after? A. Before.

Q. What did you——

A. And after.

Q. What did you talk to him about?

A. Oh, the amount of garbage they had on the Post and how often they picked up, and things like that.

Q. Did you talk to him about whether the amount of garbage in the can was a one-day accumulation or two days?

A. Yes, and there was daily pickup.

Q. Did he tell you that?

A. That is what he told me.

Q. Did he say what the contract called for?

Mr. Dovell: I object to that question, your Honor. The pretrial order does not admit any evidence that is adverse to what is agreed to in the pretrial order.

Mr. Tenny: This isn't adverse.

Mr. Dovell: That is adverse to any specified fact, what he told him. [35]

The Court: Well, I don't quite follow your

(Testimony of Mike Henry Kostelac.)

point there, Mr. Dovell. Would you mind making that a little more clear, please.

Mr. Dovell: Yes, your Honor. I might say that this was put in at the instance of the defendants at the trial of this cause, and the additional evidence——

The Court: What page?

Mr. Dovell: Page 15. "Either and both parties may submit additional evidence on any of the issues of this case provided such evidence shall not contradict any facts agreed to herein." I feel that states exactly what was told him.

The Court: In what manner?

Mr. Dovell: This Contracting Officer told him this was exactly one-day's accumulation. The contractor did not tell him that.

The Court: Just a moment. Where in the admitted facts do you find the statement that you think now is being contradicted?

Mr. Dovell: On page 5, line 21. "It was his opinion based upon the amount of garbage he was collecting that Kostelac told him that he had not collected daily as required by his contract."

Mr. Tenny: Your Honor, that is a statement made after the dispute had arisen.

The Court: Shortly after the defendant Kostelac [36] commenced to collect garbage he advised it was his opinion. I don't follow you there.

Mr. Dovell: On page 6 now, starting at line 15. "That the Contracting Officer of plaintiff relied upon such provisions of said contract and was not

(Testimony of Mike Henry Kostelac.)

personally aware of any violations of said provisions of said contract, and accordingly stated to defendant Kostelac prior to his bidding on the contract that the waste garbage in said contract should represent a one-day's accumulation thereof." He did not emphatically declare that it did.

The Court: Well, I think that here we may possibly differ in the meaning of words. I will hear the evidence.

Mr. Tenny: Would you read the last question?

The Court: The last question is, what did the major say to you prior to the time of contract concerning the amount of garbage?

The Witness: Was there an answer given?

The Court: I am not sure. If there was an answer, it was lost in the objection. Just answer it again, Mr. Kostelac.

The Witness: Well——

The Court: Keep in mind what the question is now. Before the contract what did Maiorano say to you concerning the quantity of garbage, if he said anything?

The Witness: Yes, sir; your Honor. I talked to [37] Major Maiorano about the garbage and the camp, how big it was and everything, and we had a long discussion, and he told me that DeBoer had five and six trucks going in and out every day hauling it out. So then I asked him how big the trucks were, which I have seen the trucks, and he said—he asked me how much did I think that they would haul, and I would say four and five ton, and

(Testimony of Mike Henry Kostelac.)

I thought there ought to be about twenty tons and he kind of thought I was a little too high. Then I explained to him, "You told me it was five and six trucks a day. If each truck hauled four or five ton it would be twenty ton," and he agreed that that was a fair figure.

Mr. Dovell: Your Honor, I must object. That is not responsive to the question.

The Court: Well, I think it is responsive to the first question. Whether it was responsive to counsel's question or not might be a difference of opinion.

Mr. Dovell: I have no objection to the evidence, your Honor.

Q. (By Mr. Tenny): Did Major Maiorano talk to you at all about whether or not it was important for you to look at these garbage containers?

A. Yes, he did.

Q. And what were his words as you remember them, or what did he say to you?

A. He said—state that again a little bit. [38]

The Court: What did he say about whether it was important to look at the garbage cans?

The Witness: The importance is——

The Court: What did Maiorano say about it, not the importance. What did Maiorano say about it, if you remember he said anything.

The Witness: I don't remember the exact words, but he did tell me to go out and inspect the mess-halls for myself.

Q. (By Mr. Tenny): Did he mention anything

(Testimony of Mike Henry Kostelac.)

to you about Mr. DeBoer's existing contract at that time?

A. Yes, he did. I knew the contract from the year before.

Q. And did you discuss at all about whether or not that contract required him to pick up the garbage every day? A. It did, yes.

Q. And that was that bid of June, 1945, that you bid on yourself, you say? A. That's right.

Q. And also this new contract that you were negotiating for, I believe, called for daily pickups, too? A. Daily pickups.

Q. Did anyone ever tell you that they were not going to insist on daily pickups?

A. No, sir; nobody ever has.

Q. You have testified to examining the garbage cans, [39] Mr. Kostelac. Did you poke into the garbage at all? A. No, I didn't.

Q. Why didn't you do that?

A. Well, I was dressed up and there was no need of poking into it.

Q. Had Major Mairorano told you anything about the garbage, whether it was one day or two days? A. No, he didn't.

Q. I mean before. A. No.

Q. Did you feel it was necessary for you to examine the nature of the garbage underneath?

A. No.

Mr. Dovell: I object to that question, your Honor. Here is a man that has been on the job for

(Testimony of Mike Henry Kostelac.)

ages. He is a great contractor of garbage, then he is asked whether it was necessary for him to do that. The witness should be qualified to examine garbage.

The Court: I am sure he is. I think I must hear the matter rather liberally. I will consider any more or less argumentative points of that character when I have heard it, within reasonable limits, of course. He has answered. Proceed.

Q. (By Mr. Tenny): Did you notice anything about the garbage, the smell or otherwise, that caused you to believe [40] it was more than one-day's accumulation?

A. No, not with the weather that is here compared to back east. Back in St. Louis where it is 90 and 100 degree weather in June and July, and here with a moderate temperature of 60 or 70 degrees, I didn't expect the garbage to be spoiled like that.

Q. Did you see any evidence of maggots or spoiling?

A. No. Another thing, too, is the way the garbage is brought out. It is brought out and dumped on top of each other and there is always fresh garbage on the top even though it is decayed at the bottom.

Q. Does that tend to cover up the odor?

A. It does.

Q. You testified that in the early part of June, I believe it was June the 7th—— A. June 7.

Q. You testified that you went out ahead of time, ahead of June 7, did you?

(Testimony of Mike Henry Kostelac.)

A. That's right.

Q. And did you again on June 7 or around there——

A. The morning of June the 7th I again went out.

Q. That is the date you submitted a bid?

A. That is right.

Q. What time of the morning did you go out?

A. It must have been about 8:30 or [41] 9 o'clock.

Q. What procedure did you go through?

A. The same as I did the first time.

Q. About how many garbage cans did you examine? A. About the same amount.

Q. That was—did you also talk to the mess sergeants that time?

A. Yes, sir; I did, in some places, and some of them I didn't. The majority of them I did.

Q. As a result of what you found the second time, on June 7th, what was your conclusions as to the amount of garbage per man per day?

A. Over a pound.

Q. The same as your previous conclusions?

A. That's right.

Q. Did you thereafter when you were invited to bid on June 26th, did you later go out and examine it again, Mr. Kostelac?

A. I examined it twice after the first bid.

Q. In addition to the first two you examined it two more times?

A. Twice more, and also two trips which I didn't

(Testimony of Mike Henry Kostelac.)

examine garbage. I went through the camp to see how big the area was and where the messhalls were, all of them were.

Q. You went there twice in between these two biddings? A. That's right. [42]

Q. And how did you happen to go? What was the purpose of that?

A. To bid on the—well, to check—get another check on it to make sure.

Q. Now, when in respect to this June 26 bid, when did you first go out and examine the containers then? A. Do you mean——

Q. The second time. The second bid.

A. It was—I don't remember just when, but the day of the bid, that is one time I went, on the morning of—what is it?—the 26th, and probably five or six days before that.

Q. Did you go through the same procedure?

A. Yes, I did.

Q. Did you find anything different on either of those two occasions than what you had found on the previous two occasions?

A. The only thing I found probably, on the second time where I wouldn't be sure of it, is the different grade of the garbage. Like, probably, they had watermelons the first day or mushmelons, and the other days they didn't, it was still garbage there and plenty of it.

Q. Do you know about how many times you inspected these last two visits?

A. How many messhalls? [43]

(Testimony of Mike Henry Kostelac.)

Q. Yes, how many messhalls.

A. Over forty of them.

Q. And you used the same procedure going out ahead of these trucks that were coming in?

A. Ahead of the truck.

Q. Had Major Mairoano said anything differently to you in respect to when garbage was picked up? A. No.

Q. The latter time as compared with the former?

A. No, he never said anything.

Q. Did you or did you not rely upon Major Mariano's estimate when you estimated the garbage? A. I did.

Q. And in preparing your bid, did you or did you not go on the assumption that you saw an accumulation of one day in those containers?

A. Yes, I did.

Q. Is that true of all four of these visits?

A. That is all four inspections.

Q. I believe your bid also was on a sliding scale depending on the market for hogs in Seattle, was it not? A. That's right.

Q. And your bid would go up if the price went up?

A. If the price of hogs went up, the bid would go up.

Q. Did you determine in your own mind what the range of your [44] price was per ton for garbage depending on how the market went?

A. Well, the highest would have been right

(Testimony of Mike Henry Kostelac.)

around eight or ten dollars a ton when hogs were at thirty dollars.

Q. I think your bid was fourteen and a half cents, wasn't it, at the very maximum?

A. That's right.

Q. And you figured that would be about nine or ten dollars a ton? A. Nine or ten dollars a ton.

Q. When the market was down, you figured it would be about what?

A. Well, at the present time—at that time it would have been about four to five dollars a ton.

Q. And that was your understanding of how you were bidding at that time?

A. That's right.

Q. Mr. Kostelac, to your knowledge, was there any other way you could check on the amount of garbage you would get besides making these inspections? A. No.

Q. Did you compare that or not with your experience at Jefferson Barracks and Scott Field and Bremerton? A. Yes.

Q. And about what had been your experience on garbage [45] per day per man at those places?

A. Over a pound.

Q. Over a pound? A. Yes.

Q. Did you ever discuss with Major Mariano or anybody else the provisions in your contract concerning the amount of garbage you could expect to get?

A. There was a provision in there something about four hundredths of a pound a man per day.

(Testimony of Mike Henry Kostelac.)

Q. Per man? A. Per month.

Q. Per month? A. That's right.

Q. Per day, wasn't it?

A. I wouldn't know.

Q. Well, at any rate——

A. I believe you are right, per day.

Q. What was your conversation——

Mr. Dovell: I object to that on the grounds that it is an attempt to vary the terms of a written instrument by parol evidence. The instrument is in there, and there is no contention made other than the pretrial order.

Mr. Tenny: There is significance to that being written in the contract. Mr. Kostelac had [46] signed an agreement in which it says the estimate of garbage per man per day is four hundredths of a pound. It is a written instrument. However, that is merely an admission against him that he signed something which he can certainly explain. That is not the type of contract which cannot be deviated from. He is not deviating from an obligation under the contract. He is deviating from a written statement which is damaging to him otherwise, but, certainly, I believe he may impeach that.

The Court: Well, I must confess that the situation is not entirely clear to me. I will hear the evidence and consider what, if any, effect to give to it later. Go ahead.

Q. (By Mr. Tenny): Will you tell us what was said between you and Major Mariano concerning that provision you have just testified to?

(Testimony of Mike Henry Kostelac.)

A. That four one-hundredths?

Q. Yes.

A. In other words, I explained to him that that four one-hundredths at 40,000 men would only be 1,600 pounds. That would be less than two-thirds of an ounce a man.

Q. And your sixteen hundred pounds per day would be what, less than a ton, would it? [47]

A. Less than a ton.

Q. And how many tons per day had you seen in your estimate as you examined the cans?

A. My estimate, the way I had seen it, would be from nineteen to twenty-two ton.

Q. That would be less than one ton, is that correct? A. That is right.

Q. In your previous experience with contracts near St. Louis and Bremerton, had you ever experienced in any way as low as four hundredths a pound per man per day? A. I never have.

Q. I think you said that is less than two-thirds of an ounce per man for three meals?

A. That is right.

Q. Did you discuss that with anybody else besides Major Mariano?

A. Yes. We went to some other office. I don't remember just what office it was.

Q. And what was said there?

The Court: Do you mean another Army office?

The Witness: Right across the street there, some place there, that's right, Food Disbursing, or something like that, and they discussed it and said

(Testimony of Mike Henry Kostelac.)

to just forget about it, it is in there for some Government reason. They didn't know themselves [48] what it was in there for.

Q. (By Mr. Tenny): Did they tell you whether or not it was used in all Government contracts?

A. It is in all contracts I have seen. I have seen it for years in the contracts themselves.

Q. Is it in all other contracts you have entered into in St. Louis?

A. All my garbage contracts had that in there.

Q. Have you ever had any explanation from anywhere? A. Nobody could ever explain it.

Q. Did they agree to take it out, or did you ask them to take it out?

A. I don't know for sure whether I did here or not.

Q. Did they let you know whether or not they could take it out?

A. Yes. They said they had to have it in there and they didn't know why.

Q. So, you went ahead and signed the contract anyway, did you? A. That's right.

Q. While you were talking to Major Mariano about it, did you talk to him about the type of garbage that might only make four hundredths?

A. Well, the way I explained it to him, if one man had only one meal, if he had potatoes and meat of any kind, just [49] the peelings off the potato would be more than that.

Q. Did you say that to Major Mariano?

(Testimony of Mike Henry Kostelac.)

A. Yes, I did.

Q. What did he say?

A. He agreed and laughed about it.

Q. Did they tell you whether or not you should disregard that in making your bid?

A. That's right.

Q. And did you, in fact, when you made your bid, disregard the four hundredths pound statement? A. I did.

Mr. Dovell: I object to that again, your Honor. That is trying to vary the terms of the contract.

The Court: It is the same proposition. I will have to give thought to that further.

Q. (By Mr. Tenny): Did Major Mariano ever say to you that you were optimistic?

A. Yes, he did.

Q. In your bid? A. Yes, he did.

Q. And what did you say to him when he said that?

A. Well, I said to him, "You told me that there is four and five truck loads of garbage going out every day, and each truck had four or five ton on which is over twenty [50] ton there," and he said, "Well, I think you are right then."

Q. He said, "Well, I think you are right?"

A. That's right.

Q. And after that, Mr. Kostelac, after you were told that you were optimistic, did you thereafter examine more containers?

A. Yes, I did. That was on the first day.

Q. And was that one of the reasons you ex-

(Testimony of Mike Henry Kostelac.)

amined so many? A. That's right.

Q. Was it two or three times after that that you then examined containers after he made that statement? A. Three times.

Q. Three times? A. Yes.

Q. And did you find anything from any of your examinations that would indicate that you were over-optimistic? A. No.

Mr. Tenny: Your Honor, I would like to read one sentence from the pretrial order which fits into here.

The Court: Go ahead.

Mr. Tenny: This is on page 9 of the pretrial order beginning at line 9, right at the end of the line, "And that the price bid by Defendant [51] Kostelac, 14½ cents a maximum on scale per man per month was higher than any other comparable bid ever received at Fort Lewis, either before or after the date of said contract."

Q. (By Mr. Tenny): In regard to this second invitation for June 26th, did anyone bid besides you at that time? A. No; nobody.

Q. Mr. DeBoer didn't bid then, either?

A. No, he didn't.

Q. Did you ever have any explanation after that at all? A. He just said he changed his mind.

Q. Then, did you start performing under this contract? A. Yes, I did.

Q. And when did your contract start?

A. July the 1st of 1946.

(Testimony of Mike Henry Kostelac.)

Q. And tell the Court what happened when you went out there and started picking up garbage?

A. Well, I sent two trucks in. I was on one truck myself, and we went into two different areas in each area with one truck, and all the cans were all just full. They were just running over, and I believe we got about 28 or 29 ton that day. The following day we got the same amount and we still didn't go back to where we went the first day.

Q. Do you mean you filled up your trucks without being able [52] to clean everything up?

A. That's right, without being able to clean the whole works out. That was Sunday. The second Monday, the 3rd, we went in a different area again to clean up the—finish up all the Fort, and Maiorano stopped me and he said they had a complaint down at the hospital that the area wasn't picked up for a week. So, I sent one truck down there and got a whole truck load of garbage in that one area. And then the fourth day, the 4th of July, we already made the whole field and we started back again, and we got about 17 ton of garbage that day.

Q. That was a holiday, was it, the 4th of July?

A. That's right. And the fifth day, we got only about 10 or 11 ton, and from there on it was the same.

Q. Then, it wasn't until the few days later that you actually found less garbage?

A. The third day.

Q. Then you inspected?

A. That's right.

(Testimony of Mike Henry Kostelac.)

Q. What did you do as soon as you observed that? A. I stopped to see Maiorano.

Q. And you think that was about how many days after the contract? A. It was the third.

Q. And what did you say to Major [53] Maiorano?

A. I just told him that something looked funny, that the garbage wasn't picked up for about four or five days and we got a lot of garbage first, and then I said, "We are starting back to where we started on the first day, and the garbage is not there."

Q. Was that the first day that you made daily pickups that you are talking about?

A. That's right.

Q. In other words, you got to the point——

A. We got to the point where we knew all the stops and were making the daily pickups.

Q. And you found it was less?

A. That's right.

Q. What did Major Maiorano say when you told him that?

A. Well, he said he was going to investigate it and find out just——

Q. And did any of the mess sergeants, as you started picking it up at that time, talk to you about the difference?

A. About the fourth or fifth day I was picking up. I was on the truck myself on one truck on account of my help hadn't been arranged yet, and the sergeant come out and said, "What, are you

(Testimony of Mike Henry Kostelac.)

picking this up every day now?" That would be his remark, "How come you are picking it up every day?"

Q. Had you before that time had any knowledge at all that [54] there might not be daily pickups?

A. No, because the contract before was a daily pickup, and this contract that I bid on was a daily, too.

Q. You have testified that you talked to Major Maiorano on this a few days after your contract started. Tell us what happened after that. What did you do?

A. Oh, I went to him, I imagine, about the 10th or the 12th, or in about a week or two after I had the contract, I went to him and wanted him to see if we could do something about the mistake.

Q. Do you remember what you said to him?

A. Well, I just told him that I was misled, that the garbage wasn't picked up every day, and I had bid on twice the amount of garbage, that it was a two-days' accumulation instead of one.

Q. Did he do anything about it at that time?

A. Well, we didn't enter, but we drawed out another contract that was supposed to be sent down to the Sixth Command.

Q. To the Sixth Army Headquarters?

A. To approve. And I don't know, they never did approve it, I don't think.

Q. Before we get into that, Mr. Kostelac, did you write anyone else or have your attorney write anyone else? A. I did.

(Testimony of Mike Henry Kostelac.)

Q. About when did you have your attorney [55] write? A. It was in July.

Q. And who was your attorney at that time?

A. Mr. Elliott.

Q. Stewart Elliott? A. That's right.

Q. I think he died since then, has he not?

A. That's right.

Q. And did he write it to the Contracting Officer? A. That's right.

Q. And do you know whether or not that requested that you either correct or get out of the contract? A. I did.

Q. And did you also *contract* the Sixth Army Headquarters in San Francisco? A. I did.

Q. Did you write or did you go there?

A. I flew down.

Q. And what happened there?

A. They didn't know anything about it. They was in the process of moving the first time, and the second time, I went down there two weeks later and they told me that I should go to Washington, D. C., to see the General.

Q. And did you go to Washington, D. C.?

A. I did.

Q. And who did you see there? [56]

A. I couldn't find anybody there that knew anything about it, and I went back to St. Louis and they told me to come back in two or three weeks and contact my Congressman.

Q. And who was that? A. M. L. Price.

Q. Did he go over with you?

(Testimony of Mike Henry Kostelac.)

A. His secretary went with me and spent two days.

Q. Was he able to find the files for you?

A. Never could.

Q. Did you find anyone in Washington, D. C., on either of these two visits who had any information about this? A. No.

Q. Did you find anyone who helped you in any respect? A. No.

Q. Did you find anyone in San Francisco that helped you in any respect? A. No.

Q. Did you say they were moving the files from San Francisco?

A. The first time I went there they was in the process of moving.

Q. About how many times thereafter did you make these requests to Major Maiorano to do something about it? A. Oh, many times.

Q. Can you give us any idea of how many times you requested [57] it of him?

A. Oh, about over a dozen times.

Q. And do you know whether or not Major Maiorano made an investigation?

A. I don't know whether he did or not.

Q. Did he ever tell you that he was?

A. No.

Q. Now, you started to mention something about a new agreement being drawn up. Tell us about that.

A. Well, he wanted me—to ask me what did I think that was wrong with it and how much should

(Testimony of Mike Henry Kostelac.)

I think I—if like I was telling him that it was a two-days supply and I bid high on it, where actually there was a two-day supply and it was a one-day supply, it would have been worth it, worth the money, so he says, "Now, how much do you think it should be by the man a month?" and we drawed out a sliding scale, a new bid. It wasn't exactly a bid, but it was a proposal for a bid, or something, the way he explained it. He drawed it himself, and he said, "I will send this to Frisco."

Q. And do you know whether he sent it with his recommendation or not? A. He did.

Q. And what happened after it went to San Francisco?

A. Well, he told me they didn't accept it. [58]

Mr. Tenny: I would like to read from page 6 of the Pretrial Order, at the beginning of paragraph 18, near the bottom, line 27:

"That on or about July 10, 1946, following the commencement of operations under the aforesaid contract by said defendant Kostelac, said Kostelac advised the Headquarters Sixth Army, Presidio of San Francisco, he had talked with the contracting officer, Fort Lewis, on the matter of his contract for the purchase of garbage, and further advised said Headquarters he had made a mistake in estimating the amount of garbage, assigning as reason for such mistake, in brief, that the garbage containers so inspected by defendant Kostelac had contained a two-day accumulation of garbage rather than a one-day accumulation.

(Testimony of Mike Henry Kostelac.)

"That a few days thereafter, said defendant Kostelac, through his attorney, by letter dated July 18, 1946, gave written notice to said contracting officer that he considered he had made a mistake, and therewith advised of his alleged difficulty in operating his business, a hog farm, successfully and on a profit from so small an amount of garbage.

"That defendant persistently pursued efforts to have the Government modify, adjust, or cancel his said contract, addressing his communications in that respect to both [59] the military and congressional authorities, and during which time, on or about July 24, 1946, defendant Kostelac undertook renegotiation of his contract with the contracting officer at a reduced sliding scale submitted by him, which renegotiation was subject to its approval by the Headquarters Sixth Army; that, however, upon referral of the same to said Headquarters, on or about August 2, 1946, it was the determination of said Headquarters that, upon acceptance by the contracting officer of said contract, certain rights accrued to the Government of the United States, that the War Department was without authority to release these rights, and that accordingly said contract would be enforced in accordance with the provisions thereof."

Q. (By Mr. Tenny): Can you give us an estimate of the money you spent on all the trips you took, Mr. Kostelac?

Mr. Dovell: I object to that as being incompetent, irrelevant, and immaterial.

(Testimony of Mike Henry Kostelac.)

Mr. Tenny: It may go to the question of good faith of his performance of how much he did and how much he put himself out, if not other issues.

The Court: It is dubious whether it has any weight. However, you can put it in the record if you want.

Q. (By Mr. Tenny): Give us an estimate. [60]

A. Over two thousand dollars.

Q. I believe you said——

The Court: I think you are not going to be able to finish, are you?

Mr. Tenny: No, your Honor.

The Court: And, then, there will be some cross-examination. I think we will suspend until 1:45. Is that agreeable with everyone?

Mr. Tenny: Yes, sir.

Mr. Dovell: Yes, your Honor.

The Court: Very well. We will suspend until 1:45 this afternoon.

(Thereupon, at 12 o'clock noon, the court recessed until 1:45 p.m. of the same day.) [61]

Afternoon Session

Mr. Tenny: Shall I proceed, your Honor?

The Court: Yes.

Q. (By Mr. Tenny): Mr. Kostelac, will you tell us what the attitude of the Army officers at Fort Lewis was after you notified them that you had made a mistake sometime after the first of July of

(Testimony of Mike Henry Kostelac.)

1946? What attitude did they take or what did they say to you?

A. They said they couldn't do anything about it. They would have to refer it back down to Frisco.

Q. Did you talk to them at that time as to whether or not the garbage cans had been misleading? A. Yes, I did.

Q. And did they tell you their view on that, whether they agreed or disagreed with you?

A. No, they didn't.

Q. Did they ever make any other claim on any other grounds that you were not entitled to recover?

A. No.

Q. In the last ten years, approximately, since this happened, has there ever been any other claim made against you? A. No.

Q. You mentioned a while ago, and I want to be sure that I understand, that you thought you were bidding, viewing [62] the garbage and viewing the number of men at Fort Lewis per month, that you thought you were bidding—or, your bid ranged up to a maximum of $9 or $10, is that right?

A. That is right.

Q. And is that by multiplying the number of men times the estimated amount of garbage and so forth, taking all that into consideration you figured that that was your highest price, did you?

A. That's right.

Q. Now, Mr. Kostelac, will you explain to us, if you were wrong in your estimate of the amount of garbage, would you still pay the same price every

(Testimony of Mike Henry Kostelac.)

month under your contract no matter how much garbage you got?

A. What do you mean by that?

Q. Let's say you only had 5,000 at Fort Lewis per month.

Would you pay the same price per man regardless of how much garbage you got? A. No.

Q. Will you explain that to us?

A. Well, it goes by sliding scale. If the hog market, for instance, is 14 cents and you are paying 5 cents a man per month, and if the hog market goes up to 25 cents, in that category right there, there will be 7 cents a man a month. [63]

Q. I think you misunderstood. You are talking about the hog market?

A. I am, that's right.

Q. I am assuming the hog market stays the same. Is your price that you pay at Fort Lewis the same whether the men have one hundred pounds of garbage or ten thousand pounds of garbage?

A. Yes, sir.

Q. In other words, you pay the same price, do you?

The Court: You are speaking of under the contract?

Mr. Tenny: Under the contract.

Q. (By Mr. Tenny): Is that right?

A. That's right.

Q. It is your contention that since the garbage was different you were paying about twice as much, is that right?

(Testimony of Mike Henry Kostelac.)

A. More than twice as much.

Q. After you told them about this mistake, did you continue or not to pick up the garbage at Fort Lewis? A. I did.

Q. And how long did you continue to do that?

A. Until they notified me that the 15th of December was my last day.

Q. And I think you received a letter from them in November, didn't you? [64]

A. That's right.

Q. Telling you either to pay up or that you would have to drop the contract?

A. That's right.

Q. Did you have any discussions with Major Maiorano as to whether or not you had to continue to take the garbage out of there?

A. What do you mean by that?

Q. Did he ever tell you you had to or didn't have to? A. He told me I had to.

Q. What did he say to you?

A. He said—he told me it would go against me a lot more if it was—if I defaulted on it, stopped hauling it. He said I was stuck with it.

Q. Now, what did you do with the garbage that you took away from Fort Lewis after July the 1st?

A. The first month I fed about two-thirds of it.

Q. What do you mean, you fed about two-thirds of it?

A. At my farm out at Gig Harbor I used about two-thirds of the garbage, the first three or four weeks. I didn't take all of it out there.

(Testimony of Mike Henry Kostelac.)

Q. Did you haul about two-thirds about fifty miles away with you?

A. That's right. That is the first three or four weeks of the first month. [65]

Q. What was your plan as to your future if you had had the contract at the price you——

A. (Interrupting): To build a new farm at Troy, Washington.

Q. Will you tell the court what you were planning to do about that?

Mr. Dovell: I object to that, your Honor, because that is in a speculative field. It is what garbage the man could utilize at the time rather than any prospect, and I don't know about his plans or the future, or anything.

The Court: I am curious to know what theory we are hearing this on.

Mr. Tenny: Our theory is that Mr. Kostelac did not make any profit out of this because of what happened to him because of the delay that was incurred at Fort Lewis, and the refusal of anyone to give him an outright decision. It was necessary for him, at least he felt it was necessary to continue to haul away this garbage. He could not build up the farm which I am about to ask him about and which he was going to build up near Fort Lewis. Instead, he had to take what garbage he had up to Gig Harbor, and the rest, while he was waiting for a decision, he had to dump in the field.

The Court: That may be very interesting. [66]

(Testimony of Mike Henry Kostelac.)

but why is that relevant or material to the issue here?

Mr. Tenny: I don't know from the Government's pleading, your Honor, whether there is an effort here to hold Mr. Kostelac on Quantum Meruit or Quantum Valebant.

The Court: As I read the pretrial order, they were relying solely on this contract. At least that is the way I read the pretrial order. Until I see something more about it, I will sustain the objection.

Mr. Tenny: Very well.

Q. (By Mr. Tenny): Who took over the contract on December 15 when you left?

A. John DeBoer.

Q. You were never back there again, is that correct? A. That's right.

Q. Did you get a final decision from the Comptroller General of the United States at some future date? A. Yes, I have.

Q. Do you know about when that was that you got the last decision?

A. No, but it was about over a year after December 15th.

Q. One question I neglected to ask you, Mr. Kostelac, you testified concerning your previous experience at St. Louis, and Jefferson Barracks. How frequently did you [67] pick up garbage there?

A. Three times a day.

Q. And was that done strictly or not?

A. Strictly. It was in the contract.

(Testimony of Mike Henry Kostelac.)

Mr. Dovell: I didn't get that answer. Three times a day?

Mr. Tenny: Three times a day strictly, and it was in the contract.

Q. (By Mr. Tenny): Had the Government investigated your farm at any time in connection with your bidding on this contract? A. They had.

Q. Tell us when and where that was.

A. That was a few days before the bids.

Q. Before which bid?

A. I believe it was the first bid.

Q. In the early part of June?

A. Early part of June.

Q. And who investigated it?

A. Major Maiorano and two or three other officers.

Q. Did they come out and look at your farm?

A. They did.

Q. Did they look at the number of trucks you had? A. They did.

Q. Did they make any comment about how many trucks you would need? [68]

A. They was well satisfied that I could take over the operation and handle it.

Mr. Dovell: I object to that answer. It is not responsive to the question.

The Court: Well, of course, the form of the answer isn't. You better clarify that.

Q. (By Mr. Tenny): Did you—did the Government see the trucks you had out there?

A. Yes.

(Testimony of Mike Henry Kostelac.)

Q. And did you discuss with them how many trucks would be needed? A. Yes.

Q. How many trucks, or what was said about that?

A. Well, they just said my trucks was way bigger than DeBoer's trucks, that I could easily take care of it.

Q. How big were your trucks?

A. Oh, sixteen and twenty foot beds on them.

Q. And how many tons would they each hold?

A. Twelve to fourteen ton.

Q. How many trucks did you say you had?

A. Two big trucks to haul garbage.

Q. Total of how many tons you could haul a day?

A. I had four trucks, but I used only two.

Q. Those two could haul 24 tons, you say?

A. They could. [69]

Mr. Tenny: You may inquire, Mr. Dovell.

Cross-Examination

By Mr. Dovell:

Q. Mr. Kostelac, you have stated that you had bid on three occasions, one in 1945 and two in 1946, am I correct?

A. My brother and I bid together.

Q. And you had a brother out here?

A. Then, at that time.

Q. What was his name? A. Frank.

Q. You didn't have a brother John?

(Testimony of Mike Henry Kostelac.)

A. No, sir.

Q. And was he interested in garbage?

A. Back east, but not here.

Q. And this contract bid with your brother, that was the one in 1945?

A. Do you mean this contract we are talking about now?

Q. No, the one in 1945, the bid you made in '45.

A. I believe so.

Q. Then, the bid that you made first in '46, was that by yourself? A. Just myself.

Q. And, then, the bid which you were successful in and let [70] the contract on, that was by yourself? A. By myself.

Q. Prior to this time, you had been engaged in garbage hauling at the Navy Yard in Bremerton?

A. That's right.

Q. Was any time set as to pickups there, whether it was actually each day, or how frequently? A. I believe there was.

Q. You don't recall exactly?

A. No, I don't recall exactly.

Q. But you think you made a daily?

A. I did make a daily.

Q. Do you recall the number of men at the Navy Yard at that time?

A. Well, it wasn't the number of men, it was the battleships that brought the garbage in. I bought that by the ton.

Q. You bought that by the ton?

A. It was by the ton.

(Testimony of Mike Henry Kostelac.)

Q. You weren't picking up garbage from men stationed there?

A. It was picked up there, too, and off the piers.

Q. Well, was there any estimate made as to how many men and how much garbage from the men?

A. It wasn't an estimate in that it was a ton contract.

Q. And do you recall how many tons that you obtained from Bremerton? [71]

A. Do you mean a total?

Q. Yes, daily.

A. I wouldn't know the total.

Q. You didn't keep track of that?

A. No, I haven't.

Q. How was that priced?

A. $4.12, if I am right, a ton.

Q. Where was your farm at that time?

A. Gig Harbor.

Q. And how many miles is that from Bremerton? A. Probably 16 or 17 miles.

Q. Now, do you recall your bid on a one-year basis in 1946? Do you recall what you bid then?

A. No, I don't.

Q. That was on a sliding scale also, was it not?

A. Not the first. There was three parts to that.

Q. No, I mean the bid that you actually made in 1946 when Mr. DeBoer was considered the highest bidder.

A. That was in three parts. I bid in three parts. I bid by the man, by the man on a sliding scale, and by the ton.

(Testimony of Mike Henry Kostelac.)

Q. Do you recall your sliding scale bid?

A. No, I don't. They have got it in the records, I believe.

Q. Who has the records?

A. Well, it should be in the contract, shouldn't it? [72]

Q. But you don't recall it?

A. Well, fourteen and a half was my top.

Q. No, I don't mean that, Mr. Kostelac. I mean what your sliding scale was on your bid, that is the one-year contract, not the five.

A. Well, like I tell you, again, I bid on three different proposals. They had three sections.

Q. Pick out one proposal on the sliding scale, the proposal for per man per month.

A. Fourteen and a half cents was the highest on the sliding scale.

Q. You bid the same as you did the second time?

A. I wouldn't say that I did or not. I don't know. I would have to look at it.

Mr. Tenny: I think the witness doesn't know which bid you are talking about.

Mr. Dovell: I am talking about the first bid Mr. DeBoer was bidding in 1946.

Mr. Tenny: June 7, 1946?

Mr. Dovell: Yes.

Q. (By Mr. Dovell): You have recalled what Major Maiorano said to you. Why can't you recall that bid?

A. I still can't understand you.

The Court: I don't think I fully understand it.

(Testimony of Mike Henry Kostelac.)

Make the question specific. He doesn't understand you. [73]

Q. (By Mr. Dovell): Now, in the bid as presently written, as written in the contract that you submitted, you made those figures yourself, did you not? A. Yes, I did.

The Court: That is the contract in suit you are talking about?

The Witness: That is the one that was actually signed up.

Q. (By Mr. Dovell): That was on a five-year basis, the one in this suit? A. That's right.

Q. Now, go back to the one that was for one year, that you didn't get.

A. Well, that contract.

Q. Now, what was your sliding scale? If it was any different, tell us wherein it was different.

A. There was a little difference.

Q. How much difference?

A. I couldn't say.

Mr. Tenny: I think the contract itself is the best evidence. This is ten years ago.

The Court: We have to allow some latitude in cross-examination in testing the memory of the witness. Go ahead.

Q. (By Mr. Dovell): Was that as high as was the bid of five years? [74]

A. No, it was a little lower.

Q. Do you recall how much, approximately, lower it was?

A. Well, it varies according to the hog market.

(Testimony of Mike Henry Kostelac.)

Q. I am not talking about that. I am not talking about considering the price of hogs at twenty cents. How much was your one-year contract? What was your bid at that figure?

A. Well, you can't expect me to recall all of that.

The Court: Don't argue about it. If you can't remember, just say so.

The Witness: I can't remember.

Q. (By Mr. Dovell): Do you consider how much was it off now, approximately how much was it off? A. I wouldn't know.

Q. Would you make an estimate?

A. No, I wouldn't.

Q. You can't recall anything about that bid, can you, any figure you bid?

A. Not the figure. There is a lot of figures in there.

Q. Did you base your second bid in any way upon that first bid you made?

A. Yes, sir, I did.

Q. Was it comparable to it?

A. What do you mean by that?

Q. In comparison. [75]

The Court: Use a different term. He doesn't follow that term.

Q. (By Mr. Dovell): Was it like the first bid?

A. Yes.

Q. Very much like it? A. Close to it.

The Court: Let me see if I understand, Mr. Kostelac, are you saying now that the bid you made

(Testimony of Mike Henry Kostelac.)

the year before, the one-year contract, when you bid on that was about the same as this bid you made on the one we are now in lawsuit about?

The Witness: Within a few tenths of a cent.

The Court: But fairly close?

The Witness: Pretty close.

Q. (By Mr. Dovell): And on that bid you were not the high man? A. No, sir.

Q. Did you observe when you inspected the removal of the garbage from the Fort, did you observe how many trucks were being used by Mr. DeBoer?

A. No, I didn't.

Q. You observed the garbage preceding the arrival of the trucks? A. Yes.

Q. Did you make any inquiry as to how many trucks he was using? [76]

A. Yes. Major Maiorano——

Q. You didn't observe the trucks leaving the Fort or whether they came every so often?

A. No.

Q. Once or twice a day? A. No.

Q. In your inspection of the garbage containers, describe how you inspected those containers.

A. Well, I tilted the can to see how heavy the garbage was and how full it was.

Q. Well, at any particular messhall, or where was that?

A. Well, in the field and in each area, 15 or 20 messhalls.

Q. Do you recall how many messhalls there were in all? A. No, I don't.

(Testimony of Mike Henry Kostelac.)

Q. Have you any idea how many?

A. No, I don't know, not now.

Q. Did you at that time? A. Yes.

Q. Have you any recollection of how many you recall at that time? A. Over one hundred.

Q. And you observed the garbage at about fifteen messhalls? A. In each area.

Q. That would be about 45 or so?

A. More than 45. [77]

Q. And I understand your testimony this morning that you observed about 40 or 45 cans?

A. At least 45, yes, 40 to 45 messhalls.

Q. Now, you observed them the first day of the bid? A. Before the first day.

Q. Then you observed——

A. The day of the bid.

Q. And you had five or six days to observe this garbage? According to the contract, you had five or six days, did you not?

A. I believe so. That is right.

Q. Now, the first day you were allowed to observe the garbage, what did you do?

A. I went out and looked at it.

Q. And you looked at 15 cans that day?

A. Well, more or less, 15 messhalls.

Q. Then, the second day, what did you do?

A. What do you mean, what did I do the second day?

Q. Did you go back and look at those cans the second day? A. No, I didn't.

Q. Why didn't you?

(Testimony of Mike Henry Kostelac.)

A. Well, I went the day that I turned my bid in.

Q. You didn't go back any more?

A. Well, that was enough if it was a daily pickup.

Q. Who decided it was enough? [78]

A. Well, I did.

Q. If you were checking the amount of garbage at Fort Lewis that was being produced, Mr. Kostelac, wouldn't you as a reasonable man and as a precautionary procedure have checked the same conditions six days in succession?

A. The reason I didn't was that Major Maiorano told me that it was a daily pickup.

Q. Don't bring in Major Maiorano. You were asked to inspect this garbage yourself, weren't you?

A. That's right.

Q. Major Maiorano wasn't hired by you. He wasn't receiving any consideration from you?

Mr. Tenny: I object to your arguing with the witness.

The Court: He wouldn't understand that term, I am afraid.

Q. (By Mr. Dovell): You have had a lot of experience, haven't you, Mr. Kostelac?

A. I have.

Q. You knew how much garbage was produced by each man? A. That is right.

Q. And you knew how much garbage was produced in St. Louis, or Missouri, or at the Navy Yard, by each man?

A. I wouldn't say that I knew.

(Testimony of Mike Henry Kostelac.)

Q. Well, you knew approximately. [79]

A. But I know when I see a can of garbage, and if they fed fifty men at that messhall, how much garbage they should have, or over a pound a day.

Q. That was your experience of a pound a day?

A. Over a pound a day.

Q. Would that be any reason for being more garbage at Fort Lewis than anywhere else?

A. No, it is about the same all over.

Q. Does garbage fluctuate?

A. It is seasonal.

Q. Could it be possible that there would be more garbage at one particular time, we will say in June and in July?

A. Not too much difference in them two months.

Q. You found fluctuation in the Navy Yard?

A. Well, that was from the battleships that come in. Sometimes a carrier would come in and would have fifteen ton on it. Sometimes they would all be out of there and you wouldn't get much.

Q. Now, when you inspected these cans, were you inspecting for quantity or quality of hog feed?

A. Both.

Q. Did you make any recheck on any can?

A. Yes.

Q. How many rechecks would you say you made?

A. Every time I went in I looked at them. [80]

Q. The same cans?

A. Well, not, all of the same.

(Testimony of Mike Henry Kostelac.)

Q. Could you say now under oath that you actually rechecked any can that you checked previously?

A. Yes.

Q. You had had three occasions in which to examine and inspect garbage, had you not?

A. I had inspected them four times.

Q. No, I mean on three different occasions from 1945, in June, 1946, and later, on the last contract that you got, that would be eighteen days in all that you had to inspect garbage?

A. No, I didn't inspect. My brother inspected them in 1945.

Q. Oh, you were relying on your brother?

A. Well, he is the one that turned the bid in, if you will look it up.

Q. But you had 12 days then?

A. That's right.

Q. To inspect? A. That's right.

Q. On your first inspection, was the garbage any different than it was on the second?

A. Not too much difference.

Q. It would be the same? [81] A. Yes.

Q. Now, in regard to that, you said that you considered you would be getting around 20 tons a day under this contract, from the Fort daily, is that right? A. Yes.

Q. Now, upon what basis did you make that statement?

A. According to how much garbage I have seen at each messhall that I was inspecting.

Q. You had an average of two containers at each

(Testimony of Mike Henry Kostelac.)

messhall? A. That's right.

Q. And two hundred pounds—and that is the way that you arrived at your 20 tons?

A. Not 200 pounds. It varies. Sometimes the messhalls had 70 or some had 90, and some had 120, and some 150.

Q. I mean on the average that is the way you arrived at your 20 tons? A. That's right.

Q. You didn't actually undertake to determine the total amount that was being produced at the Fort, you merely made it from an inspection of the cans that you did look into?

A. There was no other way of making an estimate.

Q. How long would it take you to make an estimate by actual observation?

A. What do you mean by that, to go and pick it up myself and [82] weigh it?

Q. No, by looking at each can.

A. Well, I couldn't do all of that.

Q. What was the reason why you couldn't?

A. Well, the trucks was in there hauling it out of there.

Q. Well, you could, at least at the time, have observed whether the cans were empty or not if the trucks were in there, couldn't you?

A. Some places they were empty where the trucks just went by.

Q. Did you see some empty every day?

A. Every time I went ahead of the truck and behind the truck, and the garbage was gone.

(Testimony of Mike Henry Kostelac.)

Q. And there were empty cans each day you went there?

A. Behind the truck. The truck had just picked them up. They were empty.

Q. And you were in there every day?

A. Not every day, just two times at each bidding. I was in there twice.

Q. You never examined or inspected the cans except one time under each contract under each bid? A. Twice.

Q. Twice? One was the first day that was allowed you?

A. I don't remember what day it was, whether it was the first day or the fifth or the sixth. [83]

Q. And, then, you went back before you put in your bid? A. That's right.

Q. And you did that twice, once on each contract? A. Twice on each contract.

Q. That is what I have said. Now, did you keep any track of the messhalls that you had examined?

A. No.

Q. And went back the next day or so, or the day afterwards, and checked on that garbage again. Did you do anything like that?

A. I didn't keep no track.

Q. No track whatsoever?

A. Just by knowing the area.

Q. Well, each time that you examined these containers, did your estimate check out the same?

A. Yes.

Q. Now, what part of the Fort did you examine

(Testimony of Mike Henry Kostelac.)

containers? A. All four areas.

Q. Did you go to the hospital?

A. No, not to the hospital.

Q. Did you ever know of a Post Food Service Supervisor?

A. I didn't know him, but I knew of the office.

Q. Did you ever contact him?

A. With Major Maiorano.

Q. Do you remember his name? [84]

A. No, I don't.

Q. Now, what assistance did you obtain in your bidding? Did you have anybody inspect for you or anyone of your force to do any work for you in examining cans? A. No, myself.

Q. Just yourself? A. Just myself.

Q. Now, you were unable, you said, to detect whether it was a one-day or two-day accumulation at the time you examined the containers?

A. Well, I knew there was a one-year contract it was daily picked up.

Q. Could you tell whether it was garbage of one-day's accumulation by looking in the can?

A. No.

Q. You couldn't tell, then, how many days it had been? A. No.

Q. But immediately afterwards and within three or four days you were able to tell that, weren't you?

A. Oh, then, sure, when I started hauling.

Q. But you couldn't devise any means of telling before that, is that right?

A. No, there wasn't.

(Testimony of Mike Henry Kostelac.)

Q. Did there appear to be a sufficient number of containers at each messhall? [85]

A. About two.

Q. You think that was sufficient? A. Yes.

Q. That held all that was there? A. Yes.

Q. Did you continue on your farm at Gig Harbor during this time that you picked up the garbage?

A. Just for the first three or four weeks.

Q. After that time where did you go?

A. Dumped it out on the farm at Troy.

Q. Why did you do that?

A. To get rid of it.

Mr. Tenny: This testimony was excluded on direct. It would be equally improper here.

The Court: Yes, that's right. It was.

Mr. Dovell: Not this particular kind, your Honor. I am trying to bring out as to why he dumped his garbage. In other words, his prospective idea of buying a farm, setting it up some place, I am not interested in that at all. I want to know why he dumped his garbage.

The Court: Let's hear it. If it opens up the subject, we will admit the other. Go ahead. Put the question again.

Q. (By Mr. Dovell): Why was the garbage dumped? [86]

A. I didn't have any hogs to feed it to.

Q. You had sold all your hogs?

A. That's right.

Q. How many hogs did you have?

(Testimony of Mike Henry Kostelac.)

A. I wouldn't remember now exactly. Over two thousand at that time.

Q. You had enough garbage, though, to feed them? A. When was that?

Q. At that time.

A. There wasn't enough garbage to feed them.

Q. There was not enough garbage to feed two thousand?

A. All my hogs—my big hogs I sold the third or fourth week of July.

Q. What size hogs were they?

A. Three and four hundred pounds.

Q. Three and four hundred pounds?

A. Yes.

Q. Would you consider it profitable to raise a hog after 225 pounds? A. Sure.

Q. Would feed cost you more after that weight than it was worth? A. No.

Q. How many trucks did you run in to Fort Lewis during the four or five months? [87]

A. Two.

Q. Were they loaded to capacity?

A. No, sir.

Q. How much of a load or what was their capacity? A. 12 to 14 ton.

Q. Well, now, how much of a load did you have on those trucks, generally speaking?

A. Five and six ton.

Q. Had the number of men been reduced by that time at the Fort?

(Testimony of Mike Henry Kostelac.)

A. The most that—the less men they would have, there would be less garbage.

Q. How much garbage would you need to operate a two thousand hog farm?

A. About 15 ton a day.

Q. 15 tons a day? A. Of good garbage.

Q. There wasn't any guarantee in the contract about the quality of the garbage, was there?

A. No.

Mr. Tenny: Just a minute. Your Honor, I object to that question. The contract is the best evidence and does contain a provision about quality.

The Court: Well, it is exploring this witness' memory of the transaction. [88]

Q. (By Mr. Dovell): Now, you got rid of the hogs because they reached that size?

A. Yes.

Q. And you undertook renegotiations with the contracting officer? A. Yes.

Q. In your contract? A. Yes.

Q. Do you recall how much reduction you asked in that?

A. I don't recall right offhand.

Q. But you did consider that you could have operated if he had let you have the garbage at a cheaper figure? A. Yes, sir.

Q. So, it wasn't really the amount of the garbage. It was the fact that you considered you had bid too high? A. No, sir.

Q. Will you explain that?

(Testimony of Mike Henry Kostelac.)

A. The garbage wasn't there. There was a two-day supply of garbage and I took it for one.

Q. Well, if the garbage wasn't sufficient to run two trucks, couldn't you have cut your overhead down by running one truck?

A. The way it was, the garbage would have cost me $20 a ton.

Q. That wouldn't be the amount that would be the price, would it? [89]

A. That is what it would have cost, $20, compared to the $8, $9, or $10 that I figured on as top price.

Q. Well, there wasn't anything said in the contract about the amount of garbage?

A. Four hundredths of one per cent per man. That is what the contract says.

Q. .004? A. Yes.

Q. That is all, isn't it? That wasn't overstated, was it, Mr. Kostelac? A. No, sir.

Q. Now, another feature of the expense that you had was trying to haul that garbage from Fort Lewis across the ferry to Gig Harbor?

A. Yes, sir.

Q. And how much did you pay on the ferry to get a load of that garbage across the water?

A. $2.20 each way for every truck.

Q. That was quite an overhead, was it not?

A. It was, sure.

Q. Did you take the matter up with the Secretary of War as well as others? A. No.

Q. Army officers?

(Testimony of Mike Henry Kostelac.)

Mr. Tenny: Just a moment, your Honor, I think [90] I should object to this at the very moment it is brought up. Mr. Dovell's trial memorandum, which I saw yesterday for the first time, has a point that is entirely new that was not in the pleading and was not in the pretrial stipulation, and I assume this question goes to that. Mr. Dovell's trial memorandum states that there was a decision by the contracting officer, and apparently in an appeal to the Secretary of War, and that therefore this defendant has not pursued his administrative procedures, which, of course, is an affirmative defense and must be pleaded and certainly must be included in the issues of this case.

The pretrial memorandum lists all the issues of law and, in fact, says there will be no others, and I would have to object to that new issue being injected at the very first moment it is injected in this case, and I do.

Mr. Dovell: Your Honor, the witness has testified that he took the matter up with everybody and he went through strenuous efforts, and it is in the pretrial order that he did, so I am asking if he took it up with the Secretary of War.

The Court: I recall that statement was made that he had done everything that he could possibly do, [91] and while for the purpose of exploring that possibility, we will admit it.

Q. (By Mr. Dovell): Did you write a letter to the Secretary of War? A. I didn't.

Q. Who wrote it? A. I don't know.

(Testimony of Mike Henry Kostelac.)

Q. Did you ask anyone to write one?

A. I don't know whether it was to the Secretary of War or who to, but they wrote one to the Army some place.

Q. Were you advised that the Secretary initiated an investigation into your complaints as to this mistake, whether or not the garbage was actually picked up? A. No.

Q. You never knew anything about that investigation? A. What investigation?

Q. The investigation as to whether the garbage had been picked up or not, actually picked up?

A. I don't know. I can't understand what you mean by that.

Q. An investigation by the Secretary of War put into effect after you wrote to him, or after someone wrote to him.

A. I don't know nothing about it. My lawyers might know. I don't know.

Q. The contracting officer told you you were too optimistic in your bids? [92]

A. The first time, yes, he did.

Q. This didn't have any effect on you?

A. After I explained to him that, he was satisfied.

Q. The garbage that you actually obtained amounted to .04 over a period?

A. What was that?

Q. The garbage that was actually obtained over the period amounted to .04?

A. More than that.

(Testimony of Mike Henry Kostelac.)

Q. I beg your pardon?

A. More than that. Thirteen times more than that every day.

Q. No, but where the force was reduced to around five thousand men?

A. It still was more than that according to men.

Q. But with an estimate of forty thousand men and it was reduced to five thousand, .04 would be the actual amount that was available to you?

Mr. Tenny: Just a moment——

The Witness: More than that.

Mr. Tenny: Just a moment, Mr. Kostelac.

The Court: The situation is very confusing to me. I am not certain that either counsel nor the witness are talking about the same thing here. You had better clarify that a little.

Q. (By Mr. Dovell): Mr. Kostelac, you knew how much garbage [93] was produced at the Navy Yard? You knew how much was produced per man?

A. No, I didn't, not at the Navy Yard. That was by the ton.

Q. In Missouri? A. In Missouri, yes.

The Court: Over a pound per man per day?

The Witness: That's right.

Q. (By Mr. Dovell): If that were the same right over here, how much garbage would you have obtained? A. 20 ton a day at 36,000 men.

Q. But suppose it dropped to 5,000?

A. There was 36,000 men there at that time.

The Court: He asked you, suppose it were the lower number?

(Testimony of Mike Henry Kostelac.)

The Witness: Well, then, it would be that much less.

The Court: Somewhere around two and a half or three ton?

The Witness: That's right. One-eighth of that.

Q. (By Mr. Dovell): And the .04 wouldn't be a bad estimate for the period of the contract?

The Court: When you use that ".04," you don't carry it through, and I am not certain what you mean.

Mr. Tenny: That is .04, your Honor, per man per month. It is a certain quantity as to number of men. [94]

The Court: I understand that, but I think you should clarify that in the question so that the gentleman understands exactly what you mean.

Q. (By Mr. Dovell): You said it would be a mere eighth of what the force of 36,000 would be?

A. 5,000 is what, is that an eighth of 40,000?

Q. Yes.

A. So it would be an eighth of 20 ton.

Q. An eighth of one pound?

A. Eighth of 20 ton. One-eighth of 20 ton for 5,000 men.

Q. Yes, but figuring on that total, if there was only 5,000 men——

A. It would be an eighth of 20 ton.

Q. And that is about what you would have obtained if you kept on with your contract?

A. No, sir. That was my findings, 20 ton, and if there was 5,000 men, it would be one-eighth of 20,

(Testimony of Mike Henry Kostelac.)

but the finding after the three or four days of cleaning the field out where it got to where it was a daily pick-up, that would have been only one ton instead of—no, that would be one-sixteenth for 5,000 men.

Q. It took some years, though, before it got down to 5,000.

The Court: Mr. Kostelac, let me ask you a question or so so that we can get that clarified. After all, I am the one that has to decide this case, [95] so I better understand it.

Examination by the Court

Q. As I understand your position, when you went out there and examined these garbage cans, you were under the impression that they were making a daily pick-up? A. That's right.

Q. Picking up each day? A. That's right.

Q. So you looked over the accumulated garbage on these occasions to get some idea of about how much garbage per man per day you could count on?

A. That's right.

Q. Now, your experience at other installations has shown you that on the average you could expect to get a little over a pound per man per day in that type of installation, is that right? A. Yes.

Q. For the same general type of installation?

A. Could I say something, however?

Q. No, just stay with it for a minute and let me get this straight. So when you examined these cans at Fort Lewis, how did they measure up in your

(Testimony of Mike Henry Kostelac.)

estimate with the general, average that you had experienced in these other installations?

A. I will tell you. At Scott Field, Scott Air Base, [96] I had a contract there, and down at Jefferson Barracks, the Jefferson Barracks was first in '41, first started, and when the war came along they didn't have it too efficient, what you call food efficiency experts, and it was as high as four pounds to a man, but gradually they cut it down to two pounds.

Q. They cut it down, and so you got down to this figure of about a pound or a little more?

A. It was two pounds at the Barracks all the time.

Q. Now, how did your estimate of the quantity that you made before you made your bid, how did that compare with this average of a pound per man per day? A. How I arrived at that?

Q. How did the estimate that you made before you made your bid compare with what your experience had been of a pound per day per man at these other installations? A. Less than back east.

Q. In other words, the estimate that you made when you looked the cans over was that it would be a little bit less than a pound per man per day?

A. That's right.

Q. Now, when you got onto the job, got the contract and started working on it, then you found that instead of a one-day's pick-up you found it was actually about two days between pick-ups? [97]

(Testimony of Mike Henry Kostelac.)

A. July the 1st I was picking some stops. That was a seven-day pick-up.

Q. Yes, but in general you allege that your mistake was that you thought that there was a daily pick-up whereas it turned out to be about on the average of two days? A. That's right.

Q. Which means that your estimate of the garbage was just half—in general was about half again too high? A. That's right.

Q. But that would have brought the garbage at Fort Lewis down to about half of what the average had been at these other installations, wouldn't it, if that were the case?

A. The cost of the garbage?

Q. No. You told me that at these other installations where you operated, Jefferson Barracks and Scott Air Base, after they got going and they got the efficiency end of it into operation, they got it down to the place where it was approximately a pound of garbage per man per day?

A. That's right.

Q. All right.Now, you told me that when you went out and estimated the quantity at Fort Lewis before you made your bid, you found that it was a little bit less? A. That's right. [98]

Q. Now, when you made that estimate, though, you thought that you were getting a pick-up every day? A. That's right.

Q. In fact, it turned out there was a pick-up only every two days, approximately?

A. That's right.

(Testimony of Mike Henry Kostelac.)

Q. Which meant that your estimate was—you would have to cut your estimate in half?

A. That's right.

Q. Approximately in half. A. Yes, sir.

Q. That would mean, then, that the experience actually at Fort Lewis was about half in quantity of garbage what your experience had shown it to be at these other bases, is that right?

A. That is right.

The Court: At least I get the picture about it now. You may proceed, counsel.

Q. (By Mr. Dovell): But you know of no reason why a man at Fort Lewis would produce any less garbage than a man in Missouri?

A. Well, it might be different ways of feeding here than back there, and on account of the weather there is more spoilage back there than here.

Q. Spoilage wouldn't produce size or weight of the garbage, would it? [99]

A. I mean stuff that would spoil they would have to throw away, otherwise, here it wouldn't spoil with this moderate temperature here.

Q. Doesn't it seem a little peculiar to you, Mr. Kostelac, that after all your inspections and after all the contracts you have held, that you actually had to pick up the garbage yourself to find out after three or four days how much you had?

A. What do you mean, pick up myself?

Q. You yourself had to pick up the garbage before you could estimate the amount that you had?

A. That was because the garbage wasn't picked

(Testimony of Mike Henry Kostelac.)

up the last three or four days of June. The hospital area hadn't been picked up for one week.

Q. That is what you are trying to say, but did you observe that? A. I was told that.

Q. You were told that?

A. Yes, I was told that.

Q. You didn't observe it yourself, though?

A. What is that?

Q. You didn't observe that yourself?

A. No, I hadn't.

Q. You were told to inspect the cans?

A. That was after I inspected it, yes. [100]

Q. Yes, but you were told to inspect that for yourself, weren't you?

A. You are asking me something that happened after.

Q. No. I am asking you if you weren't told to inspect those cans? A. Yes, I was told.

Q. But you testified that you were too tied up to attempt it, is that right? A. No, sir.

Q. And that you only inspected one day or two days at the most, instead of the six days that you were allowed? A. No, sir.

Q. And you were allowed——

A. I inspected twice at each bidding.

Q. And you had twelve days within which to inspect?

A. I inspected twice at each bidding.

Q. Now, do you think that that is reasonable and sufficient? A. It is.

Q. Provided you have somebody to rely on?

(Testimony of Mike Henry Kostelac.)

A. No, sir, that was sufficient.

Q. You were deciding that yourself? That is your own opinion? A. Yes, sir.

Mr. Dovell: That is all. [101]

Redirect Examination

By Mr. Tenny:

Q. You mentioned in your examination, Mr. Kostelac, that you were too dressed up for something. What was that?

A. Well, I was dressed up like I am now, and I ain't going to put my hands in it, pick the garbage up and look at it.

Q. Were you too dressed up to examine the containers? A. No, sir.

Q. You think there might be a difference between Jefferson Barracks and Fort Lewis in that food spoils faster there?

A. That's right. We have hundred-degree weather back there very often in the summertime, and it probably is a hundred back there today.

Q. Is it possible that the type of food eaten here may be a little different from there, too?

A. That's right.

Q. Are you familiar with those factors, and could you tell the court exactly what caused it, do you know? A. Just what do you mean?

Q. I mean, could you say right now exactly what the complete explanation is for this difference?

Mr. Dovell: I object to that because I think it is being speculative. [102]

(Testimony of Mike Henry Kostelac.)

Mr. Tenny: I will withdraw the question. It is not a very important question.

The Court: It is an obscure question.

Q. (By Mr. Tenny): Mr. Kostelac, you were talking about dividing by an eighth which I didn't understand. If you have a pound of garbage per man and you have 35,000 men at the Fort, how many pounds of garbage will you have?

A. 35,000.

Q. Yes.

A. And that would give you seventeen and a half tons.

Q. Thirty-five divided by two? A. Yes.

Q. You were talking about an eighth, I didn't understand that.

The Court: I didn't understand it, so we are not lost on that.

Q. (By Mr. Tenny): You were asked whether you saw the Post Food Service Supervisor. Do you know for sure that that was his title? A. No.

Q. You saw somebody else?

A. We went to see somebody.

Q. Now, just one final question on this subject; did you see a difference in the level of the cans, Mr. Kostelac, when you examined them before you operated under the contract [103] and the time after you operated?

A. Do you mean were the cans at different levels?

Q. Yes. A. There was.

Q. And what was the difference?

(Testimony of Mike Henry Kostelac.)

A. Half as much.

Q. And did you personally observe that?

A. Yes, sir.

Q. After you got into operation?

A. That's right.

Q. Mr. Kostelac, you have been asked about a number of hogs you had, and I believe you said you had two thousand at Gig Harbor, is that right?

A. Over two thousand at that time.

Q. In your business do you buy and sell hogs and get more in or not? A. That's right.

Q. And are hogs available so that you can buy them according to the needs?

A. Sometimes, and sometimes they are not.

Q. Without going into your plans, if you had operated under this contract, let me ask you just one or two general questions; did you plan to set up a farm at a different place nearer Fort Lewis?

A. That's right. [104]

Q. And did you have someone lined up who would have the farm available for you to rent?

A. That's right.

Q. And did you have the hogs lined up to go into that farm? A. I could have had.

Q. Do you know how to get them, and were they available? A. They was available.

Q. And did you change your plans and dump the garbage somewhere else only because of what happened under this contract?

A. That's right.

Mr. Tenny: That is all.

(Testimony of Mike Henry Kostelac.)

Examination by the Court

Q. Mr. Kostelac, explain to me, just briefly, what difference it made to you when you found you got only half as much garbage as you had expected to get?

A. Well, there is a difference. I figure on $9 and $10 a ton at my high and $4 and $5 at my low. It would have figured that the garbage cost me a low of $9 and $10 or $12, and a high of $20 and $22 or $23 just for the garbage alone besides the same expense.

Q. Why is that?

A. Well, the amount that I got.

Q. Well, did the price per unit vary according to the [105] quantity you got?

A. That's right.

Q. The less you got, the more you had to pay for it?

A. No. The less the hog market was, the less I paid for it.

Q. But the hog market, of course, is something that you had to take your chances on, didn't you?

A. That's right.

Q. But assuming that the hog market remained the same, assume that it remained the same right through the period, there wouldn't be any per unit change? A. No.

Q. Per ton change in the cost to you of this garbage, would there?

(Testimony of Mike Henry Kostelac.)

A. It would have if there wouldn't be no change in it.

Q. I didn't follow you clearly, and I want to be sure I understand your position clearly on this, so let's get together now. If the hog market remained the same, and as far as I know it did because we haven't got any issue here about that——

A. The hog market raised.

Q. Well, in that case, that was something you had to take your chances on, didn't you?

A. Every time the hog market raises, it is better for the farmer.

Q. The point of it is that you had to take your chances on whether the hog market raised, according to what was [106] agreed to in the contract?

A. That is something we wish they did, raise it.

Q. Now, if the hog market remained the same, then the per unit cost of garbage, that is, the cost per ton to you, wouldn't make any difference if there was 5,000 men or 40,000 men as far as the cost per ton is concerned, is that right?

A. That is right.

Q. So the thing that caused the difficulty was the change in the hog market, then? A. No.

Q. Well, explain to me, then.

A. Well, the way it was now, now let's take a figure, I estimated at—figured at an even 20 ton, and if I was to pay——

Q. Now, wait a moment. You estimated that you were going to get 20 tons of garbage per day, is that right? A. Yes.

(Testimony of Mike Henry Kostelac.)

Q. And you estimated that on the theory of a half pound per man per day and on the theory there was going to be 40,000 men on the post? Is that the way you got at it?

A. Your Honor, it would be a pound at 40.

Q. Excuse me. A pound of garbage per man per day would be 40,000 pounds. You would get 20 tons?

A. 20 ton. And let's put a figure down. That 20 ton would [107] cost me a hundred dollars for garbage alone, and if there is a mistake in it, you get only 10 ton, that would mean that garbage cost you $10 a ton instead of $5 a ton regardless of the hog market.

Q. All right. I understand that.

The Court: Is there anything further that either of you want to bring up?

Mr. Dovell: I guess not, your Honor.

The Court: That is all, Mr. Kostelac.

(Witness excused.)

Mr. Temy: That is our case, your Honor.

The Court: Is there anything further?

Mr. Dovell: I will call Mr. DeBoer.

The Court: Are you going to have just the single witness?

Mr. Dovell: I will have a couple witnesses, but they will be short, your Honor.

The Court: All right. [108]

JOHN DeBOER

called as a witness on behalf of the plaintiff, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: John DeBoer.

The Clerk: Spell your last name.

The Witness: D-e-B-o-e-r.

Q. (By Mr. Dovell): Your farm is located at Nisqually just before the hills as you go up to Olympia?

A. Well, there is a trout farm there, but the hog ranch is up on the prairie.

Q. How far is your farm from here?

A. About eight miles.

Q. From the Fort? A. About eight miles.

Q. From the Fort? A. Yes.

Q. Something was asked about the contracts that the Navy had with Mr. Kostelac. Have you ever had a contract with the Navy?

A. Yes, sir, I have.

Q. The Yard at Bremerton? A. I have.

Q. And did you observe how much was produced over there in [109] the way of garbage?

A. Well, in the two-year term that I have had it, I don't think it ever got over 16 ton on one day, with daily collection.

Q. Was that on the basis of battleships arriving?

(Testimony of John DeBoer.)

A. Well, it was—that was the limit. If a battleship would arrive, 16 ton a day would be the limit.

Q. What number of trucks did you employ in picking up the garbage at Fort Lewis?

A. From three to four trucks.

Q. And you are the present garbage contractor at Fort Lewis? A. Yes, sir.

Q. What was the capacity of these trucks?

A. About eight ton.

Q. And how many trips did they make each day?

A. What time?

Mr. Tenny: Just a moment. Your Honor, it has been stipulated here that the Government will introduce no evidence in this case as to the frequency of pickups of garbage. That issue has been withdrawn as far as the Government is concerned. I object to any testimony by this witness in that respect at all. The statement is very broad in the pretrial order that there will be no evidence in that respect. [110]

The Court: No evidence contrary to what is stated in the pretrial order.

Mr. Tenny: No evidence in that respect at all.

Mr. Dovell: I will place it this way, your Honor, how much garbage did you receive from Fort Lewis?

Mr. Tenny: Just a moment, I object. The pretrial stipulation, your Honor——

The Court: You have got to point this out to me, gentlemen, because it is an extensive pretrial

(Testimony of John DeBoer.)

order, and I will have to have my attention called to particular portions of it.

Mr. Tenny: Page 9, paragraph 20.

Mr. Dovell: I might say, your Honor, after that pretrial order was drawn up, counsel acquainted me with the fact that they now were ready to take a deposition of Mr. Ryer, and——

Mr. Tenny: I didn't hear the first part.

The Court: He said that after the pretrial order was drafted is when you notified him of the taking of the deposition of Ryer.

Mr. Tenny: When we found they had not conceded the daily pickup, at that time we took a deposition. The Government—may I say this, your Honor, the Government proposed this paragraph 20 and [111] this pretrial stipulation.

The Court: It does seem to me that under the pretrial order you would not raise any issue on this.

Mr. Dovell: That is the point, your Honor. I am not asking Mr. DeBoer, he wasn't there, and I am not asking him if there was an actual pickup made. I am merely asking him how much garbage he received daily from the Fort.

The Court: You are not asking him about the matter of daily pickups, only the volume of garbage?

Mr. Tenny: That is getting at it indirectly.

The Court: It doesn't seem to me there is any unfairness. I will certainly take account of it. All right. The question, Mr. DeBoer, so you will understand it, is, what quantity of garbage were you

(Testimony of John DeBoer.)

getting during the period of your contract prior to the time that Mr. Kostelac came on, and that was back in 1946, I believe.

The Witness: '45.

Q. (By Mr. Dovell): June of '46.

A. At that time—I am not permitted to state the amount and loads of garbage?

The Court: We want to know the quantity. [112]

The Witness: The tonnage?

The Court: Yes, the quantity.

The Witness: That run between 35 and 40 ton daily.

The Court: 35 and 40 tons daily. Now, that is in June of 1946?

The Witness: That was in June.

The Court: June of 1946?

The Witness: Yes.

The Court: Had there been any sharp raising or lowering in that figure in the preceding several months, or was that approximately constant?

The Witness: It could fluctuate five ton a day, that is, over a period of months.

The Court: Several months prior it would have been somewhere in that vicinity?

The Witness: That's right, somewhere between 30 and 40 tons.

The Court: All right.

Q. (By Mr. Dovell): Did you know the Post Food Service Supervisor at Fort Lewis?

A. No, I did not.

Q. Did you ever receive any communication

(Testimony of John DeBoer.)

from him? A. I have not.

Q. Did you ever receive any communications from anyone, [113] the disposal officer or anyone in charge? A. Yes.

Q. At Fort Lewis? A. Yes, I have.

Q. And what was the nature of those complaints?

A. There were complaints that garbage had not been picked up. We had our drivers stop daily at the complaint office if there was any garbage that had not been picked up.

The Court: Excuse me, Mr. DeBoer——

Mr. Tenny: Pardon me for interrupting you, your Honor, but we are getting to exactly the point I was trying to avoid.

The Court: You can't do indirectly what you have said in the pretrial order you would not do directly.

Mr. Dovell: I am merely asking him whether he received any complaints.

The Court: Well, he was going beyond that. This is no criticism on you, Mr. DeBoer, but so that you will understand, there are certain propositions stated in what we call a pretrial order and once they are stated, in obvious fairness you can't depart from those things. Do you understand?

The Witness: I don't. [114]

The Court: Well, then, I won't take the time to explain it.

Mr. Dovell: We have witnesses of actual pickup. We haven't any witnesses as to whether there was

(Testimony of John DeBoer.)

actual pickup of all the garbage out of each can at the Fort, but we should be permitted to ask the witness whether there were any complaints to him.

The Court: He has already said there was a place where complaints were made, an office where you went when complaints were made.

The Witness: That's right.

The Court: All right.

Q. (By Mr. Dovell): What did you do about the complaints?

A. The complaints, as a rule, it was that the drivers would not pick it up because the garbage was mixed up with glass or foreign material, coffee grounds, and such, so that we could not mix it in with the regular garbage.

Q. Do you know what remedial steps were taken on account of that?

A. The Quartermaster — or, at the complaint office the salvage officer checked on that, and as a rule, it was corrected fairly accurately.

Q. Now, you have heard Mr. Kostelac say that he was unable to feed two thousand hogs on the garbage he was getting. [115] How many hogs were you feeding?

The Court: In June of 1946?

Q. (By Mr. Dovell): June of 1946.

A. Approximately six thousand head.

Q. What size hogs were they?

A. They would run all the way from 120 to 220.

Q. What would you say about the profitability of feeding a hog after 220 pounds?

(Testimony of John DeBoer.)

A. Well, all you do is produce lard and you get about ten cents a pound for it.

Q. If you had hogs that weighed three or four hundred pounds, would you figure you are losing money?

A. I probably wouldn't say I lost money, but I couldn't make anything on it.

Q. Now, in feeding this garbage, is it necessary to feed any other type of food to the hogs, any grain, or anything else?

A. It helps to firm up the cartilages of the animal at the butcher if you feed a certain amount of grain with it.

Q. Did you feed anything besides garbage?

A. Yes, we did, to a certain extent.

Q. You never picked up any garbage yourself at the Fort, did you? A. No, I never have.

Mr. Dovell: You may take the witness. [116]

Cross-Examination

By Mr. Temny:

Q. You sent your men out there, did you, to Fort Lewis? A. That's right.

Q. And you know they had three or four trucks of eight tons each, is that right, eight-ton capacity?

A. Am I supposed to answer that?

Q. Yes.

A. Yes. In '46 we had three trucks operating, each one making two trips a day.

Mr. Temny: I object to that, your Honor, I can't avoid it in these answers.

(Testimony of John DeBoer.)

The Court: Go ahead. I will keep this all in mind. Go ahead.

Q. (By Mr. Tenny): How far did you say your farm was from Fort Lewis?

A. Approximately eight miles.

Q. You didn't go there yourself, is that correct?

A. No.

Q. You gave instructions to your men as to what to do, is that right? A. That is right.

Q. Did the Government contact you in July or August of 1946 concerning Mr. Kostelac's difficulty with his contract? A. In July? [117]

Q. Well, you know when Mr. Kostelac got the contract in 1946? A. Yes.

Q. The 1st of July, wasn't it? A. Yes.

Q. After he started in under that contract, were you contacted by anyone, any officer of the Government, or anyone at the Fort and asked questions about pickups of garbage at Fort Lewis?

A. Not that I recall.

Q. No one came out to question you as to the frequency of pickups or anything else, is that correct? A. Not that I can recall, no.

Q. And your farm was right close to Fort Lewis was it? A. That's right.

Q. Did you go into the Fort quite regularly?

A. If I do?

Q. Yes.

A. Personally, yes. I go quite often to see the Quartermaster or the salvage officer.

(Testimony of John DeBoer.)

Q. You know the people there and you have for years? A. Yes.

Q. And you have known them very well?

A. Certain ones I have, but, then, they have changed a lot, too, in between times.

Q. How long have you picked up garbage at Fort Lewis? [118]

A. Off and on for 24 years.

Q. You used to get paid for the garbage, didn't you? A. I think we did two years.

Q. You got paid about $8,000 a year, didn't you?

Mr. Dovell: Your Honor, I don't see what that has to do with it. I don't know what relevancy that has, your Honor.

Mr. Tenny: I would like to show there was antagonism towards Mr. Kostelac. Mr. Kostelac came in and created the first competitive situation.

The Court: Well, even so, a practice that has long since been discontinued. I don't see how that could help us.

Mr. Tenny: It is not long since.

The Court: Bring it out, then.

Q. (By Mr. Tenny): You got paid for garbage in about 1943, did you not? Wasn't that the last time you were paid for it?

A. I don't recall the year.

Q. It was right around there?

A. When we discontinued that?

Q. And it was discontinued when Mr. Mike Kostelac first came in and competitively bid on the contract?

(Testimony of John DeBoer.)

A. I don't remember, of course. That is quite a few years back, and whether it was that [119] year——

Q. No one else at Fort Lewis has ever taken the garbage contract away from you? A. Oh, yes.

Q. When was that?

A. That was in, I think, in '45.

Q. You didn't have the contract from '45 to '46?

A. Yes. I did get it back. Somebody else outbid me and then couldn't fulfill the contract and I got it back again.

Q. Who was that person?

A. That was a man by the name of Gordon out of Seattle.

Q. And why couldn't he perform the contract?

A. He didn't have the equipment.

Q. Did he bid too high?

A. Well, he was going to get paid for it, too.

Q. You say he was going to get paid for it?

A. He was going to get paid for it. He underbid me.

Q. That was in 1945? A. I believe it was.

Q. You are quite familiar with the amount that hogs bring and their weight, are you not, Mr. DeBoer? A. Do you mean to estimate?

Q. To what? A. To guess the weight?

Q. Are you familiar with the amount of money you get on the [120] market for hogs?

A. Well, we know it from month to month or from week to week, yes.

(Testimony of John DeBoer.)

Q. And do you know how that changes or varies as the weight of the hogs changes or varies?

A. Yes.

Q. Did you know that in 1946? A. Yes.

Q. Is it not a fact that in July of 1946 the price paid per hundredweight for hogs did not vary one cent, depending on the weight, whether they were over 250 pounds or not? A. In '46?

Q. That's right.

A. Was that at a time when we had OPA?

Q. I am talking about July of 1946.

A. Well, I couldn't recall that otherwise.

The Court: OPA wasn't ended until a little later than that.

The Witness: If it was on under OPA, there is the possibility that the price of 300 pounds and the price of 200 pounds was the same.

Mr. Tenny: Pardon me?

The Court: He says if it was under OPA, then the price would be the same. [121]

The Witness: It could have been. I am not quite sure.

Q. (By Mr. Tenny): Mr. DeBoer, I am not sure I understood your answer a moment ago when I asked you if anyone from Fort Lewis had ever spoken to you about the collection of garbage there right after Mr. Kostelac had his trouble.

The Court: I think Mr. DeBoer said that he couldn't recall. Had he made an inquiry of you about the collection or the amount of collections, or anything of that kind?

(Testimony of John DeBoer.)

The Witness: No.

Q. (By Mr. Tenny): You got the contract in December of 1946, didn't you?

A. The 13th, I believe.

Q. Well, in December, anyway, of 1946?

A. Yes.

Q. From the time that Mike Kostelac started to pick up the garbage as of July 1 until December when you took over the contract, did anyone from any Government office at Fort Lewis or any other army officer speak to you and ask you any questions about the pickup of garbage?

A. No. I believe it was about the week before the cancellation of Kostelac's contract that someone contacted me to ask me if I would—if I was able to fulfill that [122] contract or was willing to come back in and collect the garbage.

Q. Well, I didn't mean that. I mean, did they ask you anything about the frequency of pickups back to the June before, or anything?

A. Not that I recall.

Q. You have the garbage contract now, do you not? A. That's right.

Q. How much do you pay for garbage?

A. Well, it is on a sliding scale.

Q. All right. What is your top sliding scale?

A. I don't recall offhand.

Mr. Dovell: I object to that question. I don't think that is in issue, your Honor.

The Court: I don't know what bearing it would have. What thought do you have in mind?

(Testimony of John DeBoer.)

Mr. Tenny: Mr. DeBoer has stated he got 35 to 40 tons——

The Court: He got 30 to 40 tons, he said, per day, over a period of a number of months prior to June of 1946, and at that time. Now, what is the point?

Mr. Tenny: My question is, how much did he pay for that garbage?

The Court: What difference does it make [123] now here, ten years later?

Mr. Tenny: I was going back—suppose I start back in 1946.

Q. (By Mr. Tenny): How much did you pay for the garbage when you took over the contract Mike had had?

A. That I can't recall offhand.

Q. It was about a third, wasn't it?

A. I couldn't recall that.

The Court: You must have that stipulated here somewhere.

Mr. Tenny: I think it is Exhibit 2.

Q. (By Mr. Tenny): Now, did you bid pretty near the maximum price when you bid in December of 1946? A. I don't believe I bid.

Q. You didn't bid? Did you get a contract in December? A. Yes.

Q. How did you get the contract?

A. It was negotiated.

Q. When you negotiated that contract, did you give them a price or did you negotiate a price that was near your top figure?

(Testimony of John DeBoer.)

Mr. Dovell: Again I object, your Honor.

The Court: Overruled. It might go to the matter of damages. Go ahead.

The Witness: At that time I bid all I thought that [124] that contract was worth, because there was a reason for it.

Mr. Tenny: That is all.

Redirect Examination

By Mr. Dovell:

Q. Mr. DeBoer, has anyone *contracted* you in the last year or so with regard to your pickups?

The Court: Do you mean what his pickups were in June?

Mr. Dovell: June of 1946, with regard to whether you made any, what time, or what interval you made your pickups.

Mr. Tenny: I don't see that that is relevant.

Mr. Dovell: I think it is relevant. Counsel has opened a question of whether he was contacted by someone.

The Court: The point he is getting at, if I am not mistaken, is that he was offered some evidence that there was no investigation made of the circumstances at that time, but whether he has been contacted in the last year or so has no bearing whatever under any theory, as far as I am concerned.

Mr. Dovell: To show whether there is any prejudice on either side, your Honor. [125]

The Court: I think that is pretty remote. There

(Testimony of John DeBoer.)

is no need to spend any more time on it. I would like to know about the reason for the bid that you said Mr. DeBoer made. If no one else is going to ask it, I will ask it.

The Witness: Okay. If you know that you are going to go and bid on a contract ahead of time, we generally are notified a month ahead of time, you can be prepared to take care of a contract like that, and you have got to be prepared. When we lost our contract on July 1st, we dismantled. We laid off our men and dismantled the hog ranch, and within 48 hours we were asked to start to operate and we didn't have any swine on hand to feed it to. We had to dump a certain amount of it. That is the reason that we couldn't bid any more on the garbage at that time as what we did.

The Court: All right. Is there anything further from this gentleman?

Q. (By Mr. Tenny): Did you have a contract with Bremerton at that time?

A. No, previous to that. [126]

* * *

HARRY C. RYAN

called as a witness on behalf of the plaintiff, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: Harry C. Ryan, R-y-a-n.

(Testimony of Harry C. Ryan.)

Direct Examination

By Mr. Dovell:

Q. Where do you live, Mr. Ryan?

A. 1220 South 9th Street, Tacoma.

Q. Where do you work? A. Fort Lewis.

Q. What is your position at Fort Lewis?

A. At the present time?

Q. Yes.

A. Purchasing and Contracting Officer.

Q. That was the job formerly occupied by Major Maiorano? A. Yes, sir.

Q. And in that connection, were you there when Major Maiorano was on that job?

A. I was there as Chief Clerk.

Q. Would you tell us what authority is delegated to the Contracting Officer in the matter of letting contracts as to representations, or any other matters, outside the contract itself? [129]

Mr. Tenny: I object to that as calling for a conclusion, and this will not be the best evidence as to what authority there was, and that this is not the way to prove any lack of authority, if that is what is attempted.

The Court: Are you going to cite some regulation or something of that kind?

Mr. Dovell: No, your Honor. I am merely asking whether he was instructed in regard to any authority for him to proceed in the way of advice or letting the contracts or furnishing information,

(Testimony of Harry C. Ryan.)

or anything of that kind, whether he was restricted by instructions.

The Court: Your question was a little broader than that, I believe.

Mr. Dovell: I am restricted to that, whether he had any delegated authority to——

The Court: You see, Mr Dovell, your question was so broad that it was open to the criticism that was made here. If there is some authoritative data, whether in the form of instructions from a superior, or a memorandum, or regulations or whatever, I will permit you to show that.

Q. (By Mr. Dovell): Were there any instructions from a superior in that regard as to letting contracts? [130] A. Do you mean——

Q. Instructions.

A. Instructions from a superior to the Contracting Officer?

Q. Yes.

The Court: In effect at the time in June of 1946.

Q. (By Mr. Dovell): In '46.

A. Well, we have our regular regulations. That is all.

Q. What are those regulations?

A. Written regulations.

Mr. Tenny: I object to the contents of the regulations.

The Court: If there are any regulations, they will have to be shown, if that is involved.

Q. (By Mr. Dovell): Were you present at the time of the letting of the contract in 1946?

(Testimony of Harry C. Ryan.)

A. Yes, I was.

Q. Did Mr. Kostelac come in to the contracting office at that time? A. He was in several times.

Q. Was there any conversation that you heard between the contracting officer made in your presence? A. Yes. [131]

* * *

Q. (By Mr. Dovell): Did he make any representations as to the amount of garbage?

A. No, he did not.

Mr. Dovell: That is all.

Cross-Examination

By Mr. Tenny:

Q. You are talking now, Mr. Ryan, about that one particular moment when the bids were let, were you not? A. No.

Q. What time were you talking about?

A. I am talking about at various times. [133]

Q. Well, you were——

A. When Mr. Kostelac was in the office.

Q. Yes; but you were not present every time Mr. Kostelac talked to Major Maiorano, were you?

A. I wouldn't say every time, but——

Q. But you never at any time heard them discuss that? A. No, sir.

Mr. Tenny: That is all.

The Court: That is all, Mr. Ryan. You are excused. [134]

* * *

ORAL OPINION, DECISION AND JUDGMENT

The Court: Since adjournment yesterday, I have reviewed the evidence and examined the exhibits with respect to the facts, and have reviewed your memoranda and some of the cases referred to therein with respect to the law, and have now reached my conclusions both on the facts and on the law .

There is no question but that Mr. Kostelac made an error or miscalculation when he prepared his bid for the garbage collection at Fort Lewis. Whether the error was the result of mistake in fact, in the narrow legal sense of that term, with all of its concomitant conditions and provisions, or not, is more questionable. I am not sure that it need be decided whether there was either unilateral or mutual mistake for this reason, if there were mutual or even unilateral mistake, apparently it came to Mr. Kostelac's attention within a matter of three or four days after his entry upon execution of the contract. He himself says so.

Now, if we assume that it was a case of mistake with an adverse result to Kostelac, he would have been entitled [154] then to demand either rescission or reformation, according to the nature of the mistake. Rescission would have been applicable if the mistake were of such a character that there was never a true meeting of the minds in the contract sense between the parties. Reformation would have been applicable if there were a meeting of the minds of the parties, but they mistakenly put down in the contract what their minds had met upon.

Rescission completely sets aside the contract. It is rescinded on the theory that there never was a contract between the parties through either mistake or sometimes, fraud, which, of course, isn't involved here.

The minds of the parties never met. In other words, in a case of rescission there is no contract, never was one. In a case of reformation there was a contract, but through mistake of the scrivener or someone else, the written contract fails to properly recite what the parties actually agreed upon.

Now, in this instance, Mr. Kostelac did not demand either rescission or reformation. What he sought in effect was renegotiation which was a matter for the administrative judgment and discretion of the Army authorities, and not a matter for the court. It is not within the province of the court to renegotiate a contract for these parties.

Now, if Mr. Kostelac had taken the position promptly [155] and within a reasonable time that there was no contract at all because of the alleged mistake, and had he then demanded that the contract be declared at an end and he be freed of its obligations, it is quite possible that demand might have been accepted at that time because within a few days of the letting of the contract, other arrangements for the collection of the garbage could readily have been made with some of the other bidders on the same contract, who at that time, presumably, were in business, set up and ready to take on the responsibilities of collecting garbage at the Fort.

DeBoer, for example, had his organization, his

farm and swine, his workers, his equipment, and so on, and had that rescission occurred, in all likelihood a new arrangement for the collection of the garbage could have been made with little, if any, damage to anyone; but Mr. Kostelac did not take that position. He continued with performing under the contract, or at least performing the garbage collection responsibilities required under the contract, all the while claiming and asserting that there ought to be a different basis of compensation for the garbage.

Of course, reformation was never applicable under anybody's theory of the case. No one contends that the parties actually intended a different rate of payment for the garbage than was prescribed in the written contract, [156] and that through some error someone mistakenly put down the wrong figures. No one claims that now nor have they ever claimed it at any time.

I think I have made myself clear on this. In other words, it wasn't contended that the figure should have been "five" when it was, in fact, written down "ten," or that the number of units was mistakenly recorded by the scrivener or typed up wrong, or something of that kind. There is no occasion, as I see it, in this case for reformation.

Now, this brings us down to the proposition that without demanding rescission or reformation, which, of course, was never applicable anyway, but at most asserting renegotiation which was refused ultimately by the Army authorities, Mr. Kostelac continued with the collection of the garbage until De-

cember 15, and I feel obliged to hold that in doing so, this collection was under the contract which had not been rescinded and which Kostelac hadn't asked to be rescinded. Accordingly, the garbage collected during that period must be paid for according to the terms of the contract, which, as appears from Exhibit No. 3, is in the amount of $24,261.16, being for the period of July 1, to December 15, 1946.

Probably a rigid and narrow view of the matter would require that further damage be awarded as demanded by the [157] Government, but I do not conceive that I am obliged to take such a view under the peculiar circumstances of this case. It seems to me that Kostelac might well have secured appropriate relief by rescission had he promptly sought it, that there may well have been a substantial and important mistake as to the quantity of garbage that might be expected from the Fort, so that while I find and hold that Kostelac, who, by the way, had the benefit of counsel at this time, did not proceed as required under the law of contracts. I am persuaded that under the circumstances no further damages should be allowed, and that interest should run from the date of the certificate of indebtedness; namely, January 16, 1952, rather than from the earlier period.

That will be the judgment of the court.

Now, I am fully satisfied without expatiating on it, that this liability of Kostelac is within the intent and purpose of the bond when its provisions are considered and construed as a whole in the light of

the circumstances under which the bond was given, and, accordingly, judgment should run against the bondsman as well as the principal Kostelac.

That is the judgment of the court.

* * *

[Endorsed]: Filed August 30, 1956. [158]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the above-entitled Court, do hereby certify that pursuant to the provisions of Rule 75(o) of the Federal Rules of Civil Procedure as amended, and Subdivision 1 of Rule 10 as amended, of the United States Court of Appeals for the Ninth Circuit, I am transmitting herewith all of the original papers, pleadings and exhibits in the above-entitled cause, and the said papers, pleadings and exhibits herewith transmitted constitute the Record on Appeal from that certain Judgment of the above-entitled Court, filed and entered on June 22, 1956, to the United States Court of Appeals for the Ninth Circuit at San Francisco, California, and are identified as follows:

1. Complaint (filed May 22, 1952).

2. Summons (with Marshal's returns of service thereon).

3. Appearance, defendant Kostelac (filed June 20, 1952).

4. Appearance, defendant Maryland Cas. Co. (filed June 20, 1952).

5. Motion and Affidavit, Plaintiff, for Order of Default (filed June 8, 1953).

6. Answer of defendants and Counterclaim for Rescission (filed Feb. 16, 1955).

7. Interrogatories to Plaintiff (filed Feb. 16, 1956).

8. Motion, defendants, for Summary Judgment (filed Feb. 16, 1955).

9. Answers to Interrogatories Propounded by Defendants (filed Feb. 28, 1955).

10. Motion to Compel Answers to Interrogatories (filed Mar. 30, 1955).

11. Memorandum in support Motion to Compel Interrogatories (filed Apr. 12, 1955).

12. Statement of Reasons, etc., Re Motion for Summary Judgment (filed Nov. 1, 1955).

13. Reply (filed Nov. 10, 1955).

14. Motion to Dismiss Defendants' Motion for Summary Judgment (filed Nov. 10, 1955).

15. Plaintiff's Memorandum Opposing Motion for Summary Judgment (filed Nov. 10, 1955).

16. Order Denying Motion for Summary Judgment (filed Dec. 9, 1955).

17. Pretrial Order (filed May 11, 1956).

18. Objections to Form of Interrogatories Propounded by Defendants (filed May 21, 1956).

19. Deposition of Lt. Col. Ryer (filed June 1, 1956).

20. Plaintiff's Trial Memorandum (filed June 1, 1956).

21. Trial Brief of Defendants (filed June 1, 1956).

22. Objections to Form of Cross-Interrogatories Propounded by Plaintiff (filed June 1, 1956).

23. Reporter's Transcript of Court's Oral Decision (filed June 11, 1956).

24. Notice of Presentation Findings of Fact, etc. (filed June 12, 1956).

25. Findings of Fact and Conclusions of Law (filed June 22, 1956).

26. Judgment (filed and entered June 22, 1956).

27. Memorandum of Costs and Disbursements (filed June 25, 1956).

28. Notice, Defts., of Appeal (filed Aug. 7, 1956).

29. Undertaking for Costs on Appeal (filed Aug. 7, 1956).

30. Notice of Appeal, Plaintiff (filed Aug. 16, 1956).

31. Order Extending Time to Lodge Appeal (Sept. 6, 1956).

32. Reporter's Transcript of Proceedings of June 4 and 5, 1956 (filed Aug. 30, 1956).

33. Defendants' Designation of Record on Appeal (filed Oct. 26, 1956).

I do further certify that as part of the Record on Appeal I am transmitting herewith the following

original exhibits admitted in evidence in the trial of the above-entitled cause, to wit:

Plaintiff's Exhibits, Nos. 1, 2, 3, 4 and 5.

I do further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office on behalf of the parties hereto for the preparation of the Record on Appeal in this cause, to wit: Notice of Appeal (defendants), $5.00; and that said fee of $5.00 has been paid to the Clerk by the defendants, but that the fee of $5.00 for filing Plaintiff's Notice of Appeal has not been paid for the reason that the appeal of Plaintiff is being prosecuted by the United States of America.

In Witness Whereof, I have hereunto affixed my hand and the official seal of said Court, at Tacoma, Washington, this 31st day of October, 1956.

MILLARD P. THOMAS,
Clerk;

By /s/ E. E. REDMAYNE,
Deputy.

[Endorsed]: No. 15343. United States Court of Appeals for the Ninth Circuit. Mike H. Kostelac and Maryland Casualty Company, a Corporation, Appellants, vs. United States of America, Appellee. United States of America, Appellant, vs. Mike H. Kostelac and Maryland Casualty Company, a corporation, Appellees. Transcript of Record. Appeals from the United States District Court for the Western District of Washington, Southern Division.

Filed November 1, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the Ninth Circuit

No. 15343

MIKE H. KOSTELAC and MARYLAND CASUALTY COMPANY, a Corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 15343

UNITED STATES OF AMERICA,

Cross-Appellant,

vs.

MIKE H. KOSTELAC and MARYLAND CASUALTY COMPANY, a Corporation,

Cross-Appellees.

STATEMENT OF POINTS TO BE RELIED UPON BY THE UNITED STATES OF AMERICA

1. The district court erred in failing to compensate fully the United States for the damages sustained as a result of the breach and incomplete performance of the contract.

2. The district court erred in holding, in effect, that Mike H. Kostelac made an error or miscalculation when he prepared and submitted his bid for the garbage collection contract at Fort Lewis, Washington.

3. The district court erred in holding, in effect, that the supposed error or miscalculation excused Mike H. Kostelac from the complete performance of the contract and excused him from full liability for damages sustained by the United States as a result of the breach and incomplete performance of the contract.

4. The district court erred in denying judgment to the United States for the full sum of $104,363.40 with interest from July 1, 1951.

/s/ CHARLES P. MORIARTY,
United States Attorney,
Tacoma, Washington;

/s/ PAUL A. SWEENEY,

/s/ JOHN G. LAUGHLIN,
Attorneys, Department of Justice, Counsel for the United States.

Receipt of copy acknowledged.

[Endorsed]: Filed November 7, 1956.

[Title of Court of Appeals and Cause.]

Nos. 15343 and 15343

STATEMENT OF POINTS TO BE RELIED UPON BY DEFENDANTS-APPELLANTS

A. The District Court ruled correctly under the law and the facts that a mistake was made in connection with the contract that made such contract voidable.

B. The District Court erred in assessing damages against defendants for the following reasons:

1. There was no evidence to support the award of such damages.

2. Under the law defendants-appellants are not liable to plaintiff for such damages or amounts.

3. The Court erroneously found that defendant Kostelac voluntarily acquiesced in, ratified or confirmed a voidable contract, or did not give adequate notice of rescission, and was therefore liable for an erroneous contract price admittedly over twice the amount intended to be bid.

(a) There was no evidence in the record of acquiescence in the contract price; no ratification or confirmation of the contract; and said defendant gave prompt and repeated notices to plaintiff.

(b) Such alleged acquiescence, ratification, confirmation or lack of adequate notice of rescission was not pleaded, nor was it included in the Pretrial Order, and it was not an issue in the case.

(c) Under the evidence any such failure of defendant Kostelac, if any, to take action was caused by the words, actions and conduct of the officers and agents of plaintiff, including threats against such defendant.

(d) Such alleged failure, if any, of said defendant was further caused by refusal of plaintiff's officers and agents to disclose to said defendant facts solely within their knowledge proving that

there was in fact a mistake involved, and proving that the officers and agents of plaintiff had been the cause of defendant's being misled.

(e) Such alleged failure, if any, of said defendant was further caused by the agreement of plaintiff's officers and agents, during the period of time in question, to reform its contract, and by plaintiff's Contracting Officer agreeing during said period to a reformed price thereunder.

(1) Whether or not higher eschelons of plaintiff later repudiated the agreement of the Contracting Officer becomes irrelevant.

(f) Such alleged failure, if any, was further caused by defendant Kostelac's lack of knowledge of his right to take action, which knowledge was kept from him by plaintiff's officers.

4. Under the evidence on this equitable defense, plaintiff, by the conduct of its officers and agents, is estopped or barred in equity from asserting herein such acquiescence, ratification, confirmation or failure to give adequate notice of rescission, if any.

5. Such finding of acquiescense, ratification, confirmation or failure to give notice, under the evidence leads to an unconscionable advantage to plaintiff and a windfall resulting to plaintiff by reason of the neglect, fault and withholding of information by its own officers and agents; and such a result would be highly inequitable.

6. The finding of the Court as to such failure, if any, by said defendant, is inconsistent with its

own findings from the evidence as to the mistake, and such finding is self-destructive.

7. The finding of the Court that plaintiff was damaged by such supposed failure of defendant Kostelac is made upon a matter not at issue in the action.

8. There was no proof of breach of the conditions of the bond sued upon herein, but the evidence conclusively shows there was no breach of such bond.

(a) It appears that plaintiff was unable to prove the legal grounds necessary for reformation of the bond and hence did not allege prove or seek reformation of the bond; hence the provisions thereof are binding upon it in this action.

9. Plaintiff's subsequent default in its contract relating to the number of men at Fort Lewis, prevents recovery under said contract.

EISENHOWER, HUNTER,
RAMSDELL & DUNCAN.

By /s/ GEORGE M. HARTUNG, JR.;

TENNEY, DAHMAN & SMITH,

By /s/ E. H. TENNEY, JR.,

Attorneys for Defendants-Appellants, Mike H. Kostelac and Maryland Casualty Company, a Corporation.

[Endorsed]: Filed November 12, 1956.

No. 15343

In the United States Court of Appeals for the Ninth Circuit

MIKE H. KOSTELAC AND MARYLAND CASUALTY COMPANY, A CORPORATION, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

UNITED STATES OF AMERICA, APPELLANT

v.

MIKE H. KOSTELAC AND MARYLAND CASUALTY COMPANY, A CORPORATION, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES OF AMERICA, APPELLANT-APPELLEE

GEORGE COCHRAN DOUB,
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MIKE H. KOSTELAC AND MARYLAND CASUALTY COMPANY, A CORPORATION, APPELLANTS

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v.

MIKE H. KOSTELAC AND MARYLAND CASUALTY COMPANY, A CORPORATION, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES OF AMERICA, APPELLANT-APPELLEE

JURISDICTIONAL STATEMENT

By contract with the United States, dated June 29, 1946, Mike H. Kostelac agreed that, for a period of five years commencing July 1, 1946, he would, at a determinable contract rate, purchase and remove the kitchen waste from the kitchens and messes at Fort Lewis, Washington. This case involves a suit by the United States against Kostelac and the Maryland

Casualty Company, surety on Kostelac's bid and performance bond, for the failure of Kostelac to carry out the terms of the agreement (R. 3–8). By way of defense, defendants counterclaimed for rescission of the contract (R. 14–18). The United States being the plaintiff in the action, the jurisdiction of the district court rests upon 28 U. S. C. 1345. The judgment of the district court (R. 81, 195–199) partially denies the United States compensation for its loss sustained as a result of Kostelac's failure to perform the contract. The jurisdiction of this Court to review the judgment of the district court rests upon 28 U. S. C. 1291.

STATEMENT OF THE CASE

By contract dated June 29, 1946, Mike H. Kostelac agreed to purchase and remove the kitchen waste, suitable for animal consumption, generated at the Army installation at Fort Lewis, Washington. The contract consists of an invitation to bid, including the general provisions and articles contained in the invitation, Kostelac's bid and the Government's acceptance of that bid (Exh. 1[1]). A bid bond in the penal sum of $40,000, with the Maryland Casualty Company, as surety, accompanied Kostelac's bid (Exh. 1).

By its terms the contract was to be effective for a period of five years, commencing July 1, 1946. Throughout this five-year period Kostelac agreed to remove edible kitchen waste from Fort Lewis and

[1] Though designated for printing as a part of the printed record on appeal, the exhibits (R. 70–72) have not been reproduced. The substance of the exhibits appears in the joint pretrial order (R. 53–73) and, where necessary, critical provisions are quoted at length in this brief.

agreed to pay for the kitchen waste at a rate to be determined by the population of the military installation and dependent upon the selling price of hogs of 200 pounds weight as published on the 15th day of each month at the Seattle Stock Yard Market (Exh. 1, pp. 5–6). Specifically, when hogs, good and choice, of 200 pounds weight, were selling at $0.04 per pound, Kostelac was obliged to pay for kitchen waste at the rate of $0.055 per month for each man at the installation (Exh. 1, p. 5). If the selling price of hogs were to increase during the life of the contract, provision was made for a graduated increase in the rate per man per month to be paid by Kostelac (Exh. 1, p. 5). Thus, if, in the course of the contract, the selling price of hogs were to rise to $0.20 per pound, the rate to be paid by Kostelac was to be $0.145 per man per month (Exh. 1, p. 5).

The subject matter of the contract, of course, precluded any definite representation as to the quantity of kitchen waste which would be available for sale and removal. The invitation to bid, included an estimate that the kitchen waste yield per man would be .04 pounds per day and that the average number of men at the Fort was 40,000 (Exh. 1, p. 4). However, with further reference to the quantity of waste to be available for purchase and removal, Article I of the Invitation to Bid provided as follows (Exh. 1, p. 3):

> No assurance is given that the quantities of the items or the number of kitchens or families, or the number of men subsisted, as stated herein, will not vary during the life of the contract; and any contract that may be awarded hereon

> will in no sense be conditioned on either the amount of waste to be collected, the number of kitchens or families, or the number of men subsisted, from time to time.

The invitation to bid specified June 21 to June 26, 1946, as inspection dates (Exh. 1, p. 1). Bidders were particularly admonished, in the invitation to bid, to inspect the subject matter offered for sale and removal.[2] Before submitting his bid, Kostelac was specifically requested by the Contracting Officer at Fort Lewis to inspect the amount of kitchen waste that was then being generated at the mess halls at Fort Lewis (R. 58, 60).

Kostelac was a man with "over twenty years [experience] in handling garbage" (R. 113). At the time he submitted his bid, Kostelac was under contract to remove kitchen waste from the Naval Base at Bremerton, Washington. Prior to 1945, he had collected kitchen waste at Scott Air Force Base and at Jefferson Barracks near St. Louis, Missouri (R. 109). Upon receipt of the invitation to bid on the Fort Lewis contract, Kostelac "inspected the garbage containers at different mess halls to see how much garbage they had" (R. 112); he talked to mess sergeants, inquired as to the number of men fed at a particular mess, looked at the kitchen waste containers to see how full they were and, knowing the approximate

[2] General Provision No. 5: "Inspection: Bidders are invited and urged to inspect the property to be sold prior to submitting bids. Property will be available for inspection at the times specified in the invitation. No labor will be furnished for such purpose. In no case will failure to inspect be considered grounds for a claim."

weight of a full container, concluded that there was a yield of more than a pound of kitchen waste per day for each man fed at a mess hall (R. 112–114). Kostelac's estimate of the kitchen waste yield was in part based upon his prior kitchen waste collection experience at other military installations where, according to Kostelac, the kitchen waste yield was over a pound per day per man (R. 124). The invitation to bid, as noted above, estimated the kitchen waste yield per man per day at .04 pounds (Exh. 1, p. 4) and before submitting his bid, Kostelac was told by the Contracting Officer at Fort Lewis that his estimate of the amount of kitchen waste that would be available under the prospective agreement was too optimistic (R. 128). In spite of the written estimate of the kitchen waste yield per man and the warning that his estimate of a yield of a pound per man per day was optimistic, in submitting his bid, Kostelac apparently chose to disregard the official estimate specified in the invitation and instead based his bid upon an estimated yield of a pound of kitchen waste per man per day (R. 128).

Kostelac was awarded the contract on June 29, 1946 and commenced performance of the contract on July 1, 1946. On the 5th day of collection, the kitchen waste yield from the Fort was "10 or 11 ton" (R. 130). This amount, though considerably more per man per day than the .04 pounds estimated in the contract, was less than the yield apparently anticipated by Kostelac before submitting his bid. Shortly thereafter, Kostelac complained to the Contracting Officer that the kitchen waste he expected to

be available "[was] not there" (R. 131). He then asserted that his pre-bid estimate of the kitchen waste yield at Fort Lewis was based upon the mistaken assumption that the accumulation in the kitchen waste cans at the mess halls he examined represented a one day accumulation of kitchen waste whereas his later investigation and inspection led him to believe that there had been a two day accumulation (R. 132). On July 18, 1946, Kostelac gave written notice to the Contracting Officer that "he considered he had made a mistake" and advised of "his alleged difficulty in operating his business, a hog farm, successfully and on a profit from so small an amount of garbage" (R. 61). Through military and congressional authority, Kostelac sought without avail to have his contract administratively modified, adjusted, cancelled, or renegotiated (R. 61–62).

From July 1 until December 15, 1946, Kostelac, in accordance with his contract, collected and removed from Fort Lewis, kitchen waste with a contract value of $24,261.16 (R. 56). Though the contract called for payment for kitchen waste removed on a monthly basis (Exh. 1, Art. D, p. 2), Kostelac failed and refused to make payment. Accordingly, after notice of default by registered mail to Kostelac and the surety on his bond (R. 55), a new contract for the balance of the five-year period was, after advertisement, relet to John DeBoer on December 13, 1946 (Exh. 2, R. 71; R. 55). The terms of the DeBoer contract were identical to the Kostelac contract but at a rate per man per month less than the rate called for by

the Kostelac contract (Exh. 2, R. 71; R. 55, 57). The contract value of the Fort Lewis kitchen waste for the period of December 16, 1946 through June 30, 1951, measured by the DeBoer contract, was $80,102.24 less than the contract value of the kitchen waste when measured by the terms of the Kostelac contract (R. 57).

For the loss sustained as a result of Kostelac's breach and repudiation of his contract, the United States, in this suit against Kostelac and the surety on his bond, sought a total of $104,363.40 which represents the contract value of kitchen waste collected and removed by Kostelac under his contract and the loss sustained by the United States as a result of the diminished return derived under the terms of the DeBoer contract (R. 3–8). By counterclaim the defendants, Kostelac and the Maryland Casualty Company, sought rescission of Kostelac's contract on the ground that the contract was entered into under a mutual or unilateral mistake of fact (R. 14–18).

The district court made findings of fact (R. 74–79) and conclusions of law (R. 80) and awarded judgment for the United States, jointly and severally, against Kostelac and the Maryland Casualty Company in the sum of $24,261.16 (R. 183), the value of the waste collected by Kostelac. In substance, the district court held that there was a valid and subsisting contract between the United States and Kostelac and that Kostelac was obliged to pay for the kitchen waste he collected and removed during the period of July 1 through December 15, 1946 (R. 78,

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198). Though acknowledging that a "rigid and narrow view of the matter would require that further damage be awarded" (R. 78, 198), the district court denied the United States full compensation for its loss for the apparent reason that Kostelac had apparently mistakenly over-estimated the kitchen waste yield at Fort Lewis. From the judgment of the district court (R. 81), the United States, Kostelac and the Maryland Casualty Company have appealed.

SPECIFICATION OF ERRORS RELIED UPON

1. The district court erred in failing to compensate fully the United States for the loss sustained as a result of the breach and incomplete performance of the contract.

2. The district court erred in holding, in effect, that Mike H. Kostelac made an error or miscalculation when he prepared and submitted his bid for the kitchen waste collection contract at Fort Lewis, Washington.

3. The district court erred in holding, in effect, that the supposed mistake excused Kostelac from the complete performance of his contract and excused him from full liability for loss sustained by the United States as a result of the breach and incomplete performance of the contract.

4. The district court erred in denying judgment to the United States for the full sum of $104,363.40 with interest from July 1, 1951.

SUMMARY OF ARGUMENT

A. After five and one-half months partial performance of his five-year kitchen waste contract, Kostelac

repudiated the contract and the United States was compelled to re-let the contract for the balance of the five-year period at a rate substantially less than that called for by Kostelac's contract. A correct measure of Kostelac's liability and the Government's damage requires that the United States be awarded the performed value of the Kostelac contract less the receipts derived from the subsequent contract covering the same subject matter. In awarding the United States only the contract value of waste material collected by Kostelac and denying the United States full compensation for its loss, the district court committed plain error.

In measuring Kostelac's liability, it is immaterial that the kitchen waste yield at Fort Lewis may not have lived up to Kostelac's pre-bid expectations. The waste yield was an uncertainty inherent in the contract and not capable of precise determination. Accordingly, the invitation to bid expressly provided that any contract which might be awarded would not, in any sense, be conditioned upon the quantity of waste material to be collected. Furthermore, the invitation to bid, by way of estimate, stated that the waste yield per man per day at Fort Lewis to be approximately .04 pounds. By Kostelac's own admission, the waste yield during his brief performance under the contract was grossly in excess of this estimate. Plainly, in view of these contract terms, the alleged quantitative inadequacy of the Fort Lewis waste affords no basis for denying the United States compensation for the loss sustained as a result of Kostelac's repudiation of the contract.

B. Since Kostelac's contract was not conditioned on the quantity of waste to be collected and since the waste yield during his performance of the contract was grossly in excess of the contract estimate, Kostelac's allegedly mistaken calculation of the waste yield is immaterial to a determination of his contract liability. Similarly, his alleged mistake affords no basis for a rescission of the contract. Because quantity was not a condition of the contract, the alleged mistake was immaterial to the transaction itself, and the mistake was, in any event, due solely to Kostelac's own negligence and to the manifest inadequacy of his prebid inspection of the mess halls at Fort Lewis where the waste was generated. Furthermore, Kostelac performed under the contract long after the mistake became known to him. He collected and had available for use the waste at Fort Lewis at a time when the alleged mistake was fully known to him; and by accepting the benefits of the contract and by delaying his renunciation of the contract until December, 1946, Kostelac permitted a change in the circumstances of at least one other person interested in the contract. By reason of his delay and this change in circumstances, the United States was compelled to re-let the contract at a rate substantially less than could have been commanded had Kostelac promptly renounced the contract. These considerations, by elementary equitable standards, are fatal to any right of rescission that might otherwise have existed.

C. Kostelac's bid on the Fort Lewis waste contract was accompanied by bond guaranteeing his faithful performance of all the terms and conditions of the

contract. Manifestly, there was a virtually complete failure to perform faithfully this contract. The district court, therefore, rightly held that the surety on Kostelac's bond was, with Kostelac, liable to the United States.

ARGUMENT

Introduction

Underlying this litigation is a Government contract entered into by the United States in its sovereign capacity. The issues involved in this case have their origin in this contract and must, it is settled, be resolved by a reference to federal law. *United States* v. *Jones,* 176 F. 2d 278, 281 (C. A. 9). See also, *United States* v. *Allegheny County,* 322 U. S. 174;[3] *Clearfield Trust Co.* v. *United States,* 318 U. S. 363, 367; *United States* v. *Standard Oil Co.,* 332 U. S. 301; *Board of Commissioners* v. *United States,* 308 U. S. 343; *United States* v. *Richard Starks,* decided December 21, 1956 (C. A. 7); *Girard Trust Co.* v. *United States,* 149 F. 2d 872, 874 (C. A. 3); *Woodward* v. *United States,* 167 F. 2d 774, 779 (C. A. 8). Since only federal questions are involved, there is "no room for the application of any local law" (*United States* v. *Jones,* 176 F. 2d 278, 281 (C. A. 9)) and no occasion for reference to Washington law where the contract involved was executed and should have been performed. With federal contract law as a polestar, we turn to the issues raised

[3] "The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state." 322 U. S. at 183.

by the Government's appeal and by the appeal of the defendants in the court below.

I

The District Court erred in denying the United States full compensation for the loss sustained as a result of Kostelac's incomplete performance and repudiation of the contract

A. *The value of Kostelac's contract, if performed, is the correct measure of the Government's compensable loss.*—Proceeding under his contract of June 29, 1946, Kostelac, during the period July 1 through December 15, 1946, collected and removed from the Army installation at Fort Lewis, waste material of a contract value of $24,261.16. The district court awarded the United States judgment for this amount. The correctness of this aspect of the judgment is not open to serious question. Not so, however, is the court's denial of compensation for the loss sustained by the United States as a result of Kostelac's repudiation of his contract. By reason of Kostelac's failure and refusal to pay for the kitchen waste on a monthly basis as required by the contract and his failure to remedy this breach when warned to do so,[4] the Government was compelled to re-let the contract to John

[4] The following communication was addressed to Kostelac and the Maryland Casualty Company on November 27, 1946 by the Purchasing and Contracting Officer, Fort Lewis, Washington (Exh. 4, 5; R. 72):

* * * * *

You are hereby notified that the kitchen waste on subject account is being advertised for sale. However, you will be given the opportunity of remedying the default of contract presently existing (non-payment) at any time prior to the date set (13 December 1946) for opening of bids. Failing to do so, the kitchen waste will be sold to the highest bidder and the govern-

DeBoer at a contract rate substantially less than the rate called for by Kostelac's contract (Exh. 2, R. 71).

It is elemental contract and damage law that, in assaying the liability of a defaulting contractor, the value of the contract, if performed, is the yardstick of the contractor's liability. *United States* v. *McMullen,* 222 U. S. 460; *United States* v. *Behan,* 110 U. S. 338; *United States* v. *P. J. O'Donnell & Sons, Inc.,* 228 F. 2d 162 (C. A. 1); *Burstein* v. *United States,* 232 F. 2d 19 (C. A. 8); *Conti* v. *United States,* 158 F. 2d 581 (C. A. 1); *Aerial Lumber Co.* v. *United States,* No 14,554 (C. A. 9), decided August 10, 1956; cf., *McKenney* v. *Buffelen Mfg. Co.,* 232 F. 2d 5 (C. A. 9); *Restatement of Contracts,* § 329; McCormick on *Damages,* § 137. In this case, Kostelac's contract, if performed, had a contract value of $158,339.64. Deducting from this sum the collections derived under the subsequent DeBoer contract, $53,976.24, the immediate consequential loss to the United States from Kostelac's repudiation, is $104,363.40. In the absence of any contention or evidence that the DeBoer contract was not the best mitigable bargain available to the United States in the circumstances,[5] the difference

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ment will proceed against the contractor and surety to collect money now due as well as damages that will accrue if sale for account fails to bring the return specified in the subject contract.

* * * * *

[5] The disparity in the value of the two contracts is fully explained by the fact that when DeBoer assumed the Kostelac contract, he was not prepared to handle the contract (R. 191). Once Kostelac was awarded the contract, DeBoer, who had the contract for the preceding year, dismantled his hog ranch and laid off his employees (R. 191, 196–197). Being unprepared for the contract he could not, in December, 1946, bid any more on the waste material than he did (R. 191).

in the two contracts, identical except as to the price to be paid, represents the correct measure of the Government's loss and of Kostelac's liability. In limiting the Government's recovery of $24,261.16 and denying full compensation, the district court committed plain error.[6] See cases cited, *supra*.

B. *Kostelac's alleged mistake with respect to the quantity of waste to be collected does not excuse him from full liability to the United States.*—In awarding the United States only the contract value of the kitchen waste actually collected by Kostelac, the district court acknowledged that a "rigid and narrow view of the matter would require that further damage be awarded as demanded by the Government" (R. 198). In denying the Government what would otherwise be its obvious entitlement, the district court was apparently swayed by Kostelac's contention that, in submitting his bid, he had mistakenly estimated the quantity of garbage that might be expected from Fort Lewis (R. 198).[7] A full consideration of this so-called "mistake" and its consequent effect, if any, on Kostelac's liability, requires more than a consideration of the naked assertion by Kostelac that he made a mistake. For the mistake upon which he relies to avoid his contract liability assumes a very different

[6] General Provision No. 7 (Exh. 1) provided in part as follows: "* * * Unless the purchaser pays for and removes the property as required by the provisions of this contract, the Government shall have the right to dispose of the property and hold the purchaser responsible for any loss incurred by the Government as a result of a failure to pay for or remove the property; * * *."

[7] The district court found that Kostelac "made an error or miscalculation when he prepared his bid" (Fdg. V; R. 76).

color when considered against the background of circumstances which prevailed in June of 1946, when Kostelac's contract bid was submitted and accepted, and in July, 1946, when Kostelac commenced performance of his contract and first "discovered" his mistake.

1. The kitchen waste offered for sale was intended for animal consumption and Kostelac stated in his bid that the kitchen waste would be used for feeding hogs at his farm located at Gig Harbor, Washington (Exh. 1, p. 3). During the year July 1, 1945 through June, 1946, which covers the period in which Kostelac submitted his bid, Kostelac had a maximum of "about eight thousand" (R. 109) hogs, apparently sustained by kitchen waste collected by Kostelac under contract with the Bremerton Naval Base (R. 108).

The purchase price of kitchen waste was, of course, by the terms of the contract, dependent upon the selling price of hogs, a commodity which, in June, 1946, was subject to price control. At the Seattle terminal market the ceiling price of hogs in June of 1946 was fixed at $15.80 per cwt. (Maximum Price Regulation No. 469, issued September 11, 1943 (8 Fed. Reg. 12562), as amended through October 8, 1945 (10 Fed. Reg. 12653)). With the ceiling price of hogs thus fixed, the contract rate payable for kitchen waste, according to the sliding scale specified in Kostelac's bid, would have been a maximum of $0.09 per man per month (Exh. 1, p. 5).

By Section 1 of the Act of June 30, 1945, 59 Stat. 306, the Emergency Price Control Act of 1942, 56

Stat. 23, as amended (~~60~~ 52 U. S. C. A., App. 901, *et seq.*), terminated on June 30, 1946 and price control authority was not again revived until July 25, 1946. Act of July 25, 1946, Section 1, 60 Stat. 664. Thus, when Kostelac commenced performance of his contract on July 1, 1946, there also commenced a 25-day period in which the selling price of hogs was not subject to maximum price regulation. By the 15th of July, hogs on the Seattle market were selling at $20.50 per cwt. (Exh. 3, p. 3), an increase of $4.70 per cwt. over the June, 1946 ceiling price. In consequence of this increase in the market price of hogs, Kostelac, for the first month of performance of his contract, was obliged to pay at the maximum sliding scale rate of $0.145 per man per month for the kitchen waste he removed from Fort Lewis (Exh. 1, p. 5).

The termination of price control legislation on June 30, 1946, not only made it possible for an increase in the contract rate for kitchen waste, but the precipitous price rise in the hog market, in the absence of price control, served as an inducement to hog farmers to unload at a favorable market price. By the "third or fourth week" in July, 1946 (R. 159), Kostelac had "sold all [his] hogs" (R. 158) and because "[he] didn't have any hogs to feed it to" (R. 158), after the first three or four weeks of July 1946 he "dumped" the kitchen waste he collected at Fort Lewis on the ground in order "to get rid of it" (R. 158).

Kitchen waste derives its commercial value because of its suitability for hog consumption. Without hogs to feed it to, the Fort Lewis kitchen waste no doubt was valueless to Kostelac. It is not, therefore, sur-

prising that Kostelac promptly sought escape from the burdens and obligations of his contract. With the advice of counsel, he complained to military authority that he had made a mistake in over-estimating the kitchen waste yield at Fort Lewis (R. 61) and advised military authority of his "difficulty in operating his business, a hog farm, successfully and on a profit from so small an amount of garbage" (R. 61). With a sizable kitchen waste contract but without hogs to consume the waste, the difficulty of operating a hog farm successfully and at a profit is readily apparent; one is, however, legitimately entitled to question the sincerity of a complaint as to the quantitative insufficiency of the Fort Lewis kitchen waste when the waste which was available and collected by Kostelac was in part at least (R. 140–141) dumped on the ground by him in order to get rid of it (R. 158).[8]

[8] Furthermore, the bid submitted by Kostelac on June 26, 1946 was not his first attempt to obtain the waste contract at Fort Lewis. He was a low and unsuccessful bidder on the waste contract for fiscal 1946—the contract for that year going to his competitor, John DeBoer. In early June 1946, he bid on a new contract for fiscal 1947. Again his bid was lower than that of John DeBoer. However, DeBoer was not awarded a contract because the Army cancelled the invitation and sought bids on a long term contract rather than on a yearly basis as in the past. In response to the second invitation in June 1946, calling for bids on a one to five year basis, Kostelac was the only bidder. His bid pursuant to this invitation and which led to the award of the contract here involved, was higher than his bid earlier in June 1946 (R. 148) and higher than any other comparable bid received at Fort Lewis (R. 63–64). From the competitive situation which existed between Kostelac and DeBoer, one might reasonably infer that Kostelac's high bid on June 26, 1946, after two prior unsuccessful bids, was the product of competition rather than a mistaken estimate of the waste yield.

2. Whether, however, Kostelac was in fact mistaken or merely seeking a means of escape from his contract, it is, under the terms and conditions of the contract, immaterial to his liability that the kitchen waste yield at Fort Lewis did not conform to Kostelac's expectations. As previously noted, a precise determination of the kitchen waste to be generated at Fort Lewis was inherently impossible. The yield would, of course, vary with the population of the Fort and certainly no one was in a position to foretell over an extended period what the military population might be.[9] Any estimate of the waste yield would necessarily be purely speculative and anyone bidding on the contract was possibly buying a "pig in a poke" or a "cat in a bag."[10] This element of quantitative uncertainty was undoubtedly reflected in the bid submitted by Kostelac and accepted by the United States. And even though the quantity of kitchen waste generated at Fort Lewis may not have conformed to Kostelac's pre-bid calculations, this circumstance affords no basis for partially relieving Kostelac from his contract responsibility. 3 Pomeroy's *Equity Jurisprudence* (5th Ed.), § 855; cf. *Triple "A" Machine Shop* v. *United States,* 235 F. 2d 626 (C. A. 9).

Any doubt as to whether the alleged quantitative insufficiency of the waste material affords a basis for excusing Kostelac from full liability is dispelled by

[9] During the five-year period covered by Kostelac's contract, the rations at Fort Lewis varied from a monthly high of 35,139 in July, 1946 to a low of 5,681 in May, 1948 (Exh. 3, p. 3).

[10] *Triple "A" Machine Shop* v. *United States*, 235 F. 2d 626, 631 (C. A. 9).

the contract itself. Article I of the contract (Exh. 1, p. 3) provided as follows:

> No assurance is given that the quantities of the items or the number of kitchens or families, or the number of men subsisted, as stated herein, will not vary during the life of the contract; *and any contract that may be awarded hereon will in no sense be conditioned on either the amount of waste to be collected,* the number of kitchens or families, or the number of men subsisted, from time to time. [Emphasis supplied.]

Since Kostelac's contract was in "no sense * * * conditioned on * * * the amount of waste to be collected" plainly the claimed quantitative insufficiency of the waste which was available affords no basis for relieving Kostelac from the immediate consequences of his repudiation of the contract. *Lipshitz & Cohen* v. *United States,* 269 U. S. 90; *Maguire & Co.* v. *United States,* 273 U. S. 67; *United States* v. *Silverton,* 200 F. 2d 824 (C. A. 1); *American Elastics Co.* v. *United States,* 187 F. 2d 109 (C. A. 2), certiorari denied, 342 U. S. 829.

Moreover, the kitchen waste yield at Fort Lewis during Kostelac's brief performance under the contract was far in excess of the amount of kitchen waste estimated in the contract. With respect to the ".04 pounds per man per day" (Exh. 1, p. 4), the contract estimate of the yield, Kostelac testified as follows (R. 163–164):

> Q. [By Mr. Dovell, Assistant United States Attorney] The garbage that was actually obtained over the period amounted to .04?

A. [By Mr. Kostelac] More than that.
Q. I beg your pardon?
A. More than that. Thirteen times more than that [.52 pounds] every day.

Thus, the contract not only was not conditioned on the amount of waste to be collected, but it appears that the amount actually generated and available was thirteen times in excess of the contract estimate. While Kostelac, in calculating the waste yield, apparently chose to disregard the .04 pounds estimate which appeared in the invitation to bid (R. 125–128) and instead relied largely upon his prior collection experience at other military installations, plainly if his calculations proved erroneous, the resulting predicament is of his own making and affords no basis for absolving him of the full consequences of his subsequent repudiation of the contract. *Maguire & Co.* v. *United States,* 273 U. S. 67, 68–69; *Lipshitz & Cohen* v. *United States,* 269 U. S. 90, 92.

II

The District Court correctly held that Kostelac was not entitled to a rescission of the contract

Since Kostelac's contract was in "no sense * * * conditioned on * * * the amount of waste to be collected" (Exh. 1, p. 3) and since the kitchen waste yield during his performance of the contract was grossly in excess of the contract estimate. Kostelac's asserted miscalculation of the anticipated waste yield at Fort Lewis is immaterial in determining his contract liability. The contract provisions aside, however, there is no equitable basis for a court to relieve

Kostelac of his contract liability. There was not a trace of fraud in the transaction between the United States and Kostelac (R. 196); no evidence of bad faith, and no concealment by the United States of a known fact (R. 59). See *United States* v. *Jones,* 176 F. 2d 278, 285 (C. A. 9).[11] Kostelac's defense to this action rests upon an alleged right to a rescission of the contract because, in his pre-bid estimate of the kitchen waste yield at Fort Lewis, he supposedly labored under the mistaken belief that the waste containers he inspected at Fort Lewis contained a one day accumulation of kitchen waste whereas, he claims, there was, in fact, a two day accumulation.

To rescind a contract because of a unilateral mistake of one of the parties, the mistake must have been material to the transaction, the mistake must not have been the result of negligence, and the right to rescind must be promptly asserted once the mistake has become known. *Grymes* v. *Sanders,* 93 U. S. 55, 62; *United States* v. *Jones,* 176 F. 2d 278 (C. A. 9); 3 Pomeroy's *Equity Jurisprudence* (5th Ed.), § 856. Assuming that Kostelac was actually mistaken, we show that none of these conditions is satisfied under the facts of this case and, further, that by partially performing the contract after the mistake became

[11] Unlike the fact situation in *United States* v. *Jones, supra,* there is no evidence whatever that agents of the United States knew that Kostelac's bid was based upon a mistaken estimate of the kitchen waste yield at Fort Lewis. While Kostelac's bid was higher than other comparable bids ever received at Fort Lewis (R. 64), there was nothing in this fact to put the Government on notice of a possible mistake because never before had the contract been awarded for a five-year period.

known to him, Kostelac waived or lost any right to rescind the contract that he may have had.

A. *The mistake was not material to the transaction.*—We have shown above that under the express terms of the invitation to bid, any contract that might be awarded as a result of the invitation was in "no sense [to] be conditioned on * * * the amount of waste to be collected" (Exh. 1, p. 3). This provision was included in the contract because the quantity of waste to be collected was an inevitable and an inherent uncertainty in the contract. See 3 Pomeroy's *Equity Jurisprudence* (5th Ed.), § 855. In absence of this contract stipulation, it would always be open to a contractor to claim that he entered into the transaction in the mistaken belief that a certain quantity of waste would be available. As this case illustrates, the assertion of such a mistake is not susceptible of objective proof or disproof. It was precisely this type situation which the contract provision with respect to quantity was intended and designed to foreclose.

In this quantitative respect, the contract stipulation bears a close analogy to the "as is, where is" clause common to Government surplus sales contracts or to contracts where there is an express disclaimer of quantitative warranty. It is settled beyond dispute that a party to a contract containing such clauses can make no claim, affirmative or defensive, based upon the failure of the transaction to live up to his expectations, whether with respect to the quantity or quality of the subject matter of the contract. *Maguire & Co.* v. *United States,* 273 U. S. 67; *Lipshitz &*

Cohen v. *United States,* 269 U. S. 90; *Mottram* v. *United States,* 271 U. S. 15; *United States* v. *Silverton,* 200 F. 2d 824 (C. A. 1); *American Elastics Co.* v. *United States,* 187 F. 2d 109 (C. A. 2), certiorari denied, 342 U. S. 829; *Samuel Furman* v. *United States,* 140 F. Supp. 781 (C. Cls.), certiorari denied, 352 U. S. 847; *Sachs Mercantile Co.* v. *United States,* 78 C. Cls. 801; *General Textile Corp.* v. *United States,* 76 C. Cls. 442; *Yankee Export & Trading Co.* v. *United States,* 72 C. Cls. 258; *Silberstein & Son* v. *United States,* 69 C. Cls. 412; *Snyder Corp.* v. *United States,* 68 C. Cls. 667; *Shapiro & Co.* v. *United States,* 66 C. Cls. 424; *Triad Corp.* v. *United States,* 63 C. Cls. 151. Similarly, to give effect to this contract insofar as it expressly disclaims quantity as condition to the contract, requires that Kostelac's mistaken calculation as to the quantity of waste to be collected be held to be immaterial to the transaction and to preclude rescission of the contract.

B. *The mistake was due to Kostelac's negligent inspection.*—In the invitation to bid, six days were set aside for the inspection of the material offered for sale (Exh. 1, p. 1) and all bidders were "invited and urged to inspect the property to be sold prior to submitting bids." [12] In addition to this general provision, Kostelac, in particular, was urged by the Contracting Officer to inspect the amount of waste that was then being accumulated at mess halls at Fort Lewis. Although six days were set aside for inspection, Kostelac made an inspection only on the first day set aside

[12] General Provision No. 5, Exh. 1, *supra*, n. 2.

for inspection and didn't return for further inspection until the day he submitted his bid (R. 151).

In making his inspection and in estimating the waste generated at Fort Lewis, Kostelac examined the waste containers at some of the mess halls. In examining waste containers at a mess hall, in order to estimate the daily accumulation of waste, one would think that an obvious inquiry to a man of "over twenty years [experience] in handling garbage" (R. 113) would be whether the accumulation under observation represented a one, two or even a week's accumulation. The most reliable way of resolving this inquiry would have been for Kostelac to observe the same container on two or more consecutive days. Kostelac, however, did not do this (R. 151). As noted above, he made his inspection on the first day but did not again return to inspect until the day he submitted his bid (R. 151).

Although, in his inspection, Kostelac talked to mess sergeants and inquired as to the number of men fed at a particular mess, he did not inquire as to whether the waste observed at the mess was a day's accumulation or a week's accumulation. A simple inquiry, such as this, directed to a mess sergeant, would reasonably seem to be an obvious occurrence to a man of Kostelac's experience in the waste collection field. In these circumstances, it is only reasonable to conclude, therefore, that Kostelac's mistaken belief that the waste he actually observed represented a single day's accumulation is attributable to his own negligence and to the manifest inadequacy of his own inspection. A mistake arising in such circumstances affords no ground for relief. *Maguire & Co.* v. *United States*, 273 U. S. 67,

68–69; *Mottram* v. *United States,* 271 U. S. 15; *Triple "A" Machine Shop* v. *United States,* 235 F. 2d 626 (C. A. 9); *United States* v. *Silverton,* 200 F. 2d 824 (C. A. 1); *Triad Corp.* v. *United States,* 63 C. Cls. 151.

C. *Kostelac's delay in renouncing the contract prejudiced the United States.*—For a unilateral mistake of fact to serve as a basis for rescission of a contract, it is fundamental that equity requires a prompt assertion of the right to rescind once the mistake becomes known. *Grymes* v. *Sanders,* 93 U. S. 55, 62; *Robert Hind, Limited* v. *Silva,* 75 F. 2d 74, 79 (C. A. 9). A corollary to this equitable principle is that performance under the contract after the mistake becomes known, operates as a waiver of any right to rescind that otherwise might have existed. *American Elastics Co.* v. *United States,* 187 F. 2d 109, 113–114 (C. A. 2), certiorari denied, 342 U. S. 829; *Grymes* v. *Sanders,* 93 U. S. 55, 62.

The mistake upon which Kostelac predicates his right to rescind became known to him within three or four days (R. 195) after he commenced performance of the contract. As the district court observed (R. 196–197):

> [I]f Mr. Kostelac had taken the position promptly and within a reasonable time that there was no contract at all because of the alleged mistake, and had he then demanded that the contract be declared at an end and he be freed of its obligations, it is quite possible that demand might have been accepted at that time because within a few days of the letting of the contract, other arrangements for the collection of the garbage could readily have been made

with some of the other bidders on the same contract, who at that time, presumably, were in business, set up and ready to take on the responsibilities of collecting garbage at the Fort.

DeBoer, for example, had his organization, his farm and swine, his workers, his equipment, and so on, and had that rescission occurred, in all likelihood a new arrangement for the collection of the garbage could have been made with little, if any, damage to anyone; but Mr. Kostelac did not take that position.

Instead, Kostelac collected and removed the kitchen waste according to the contract terms until December 15, 1946 when the contract was re-let to John DeBoer after Kostelac refused to pay for the waste as his contract required. In the interim between July 1 and December 15, 1946, DeBoer, who had the Fort Lewis waste contract prior to Kostelac, laid off his men and dismantled his hog ranch (R. 191). When asked in December to assume the Kostelac contract, DeBoer was not prepared to handle the contract (R.191) and for that reason he "couldn't bid any more on the garbage at that time" (R. 191).

In this case, therefore, for nearly five and one-half months after he knew of his mistake, Kostelac, except for nonpayment, performed under the contract in a manner inconsistent with any right of rescission; in this period he collected and had available for use, the waste generated at Fort Lewis and to this day, as his appeal to this Court demonstrates, he continues to resist payment for the material he actually received; and, by his failure promptly to renounce the contract, a change of circumstances occurred as a result of

which the United States was compelled to accept a less favorable contract price for the balance of the five-year period. As the district court rightly concluded (R. 195–197), in these circumstances there is no basis for a rescission of the contract. *American Elastics Co.* v. *United States,* 187 F. 2d 109, 114 (C. A. 2), certiorari denied, 342 U. S. 829; *Grymes* v. *Sanders,* 93 U. S. 55, 62–63.

III

The District Court correctly held that Kostelac's liability on the contract was covered by the bond guaranteeing performance of the contract

General Provision No. 1 of the invitation to bid (Exh. 1) specified that "bids must be accompanied by cash, certified checks, bond, or postal money order made payable to the Treasurer of the United States in the amount of at least twenty per cent (20%) of the total sum of the bid." In compliance with this specification, Kostelac's bid was accompanied by a bond, with himself as principal and the Maryland Casualty Company as surety, in the penal sum of $40,000 (Exh. 1, p. 7), an amount equal to twenty per cent of the estimated receipts ($200,000) to be derived from Kostelac's bid and contract (Exh. 1). General Provision No. 1 further provided, in effect, that if a contract was awarded as a result of the bid, the amount accompanying the bid "will be retained [by the United States] as guarantee for the faithful performance of all the terms and conditions of the purchase."[13]

[13] The bond furnished by Kostelac makes express reference to the invitation to bid (Exh. 1, p. 7). It is settled, of course, that the contract and the bond which it guarantees must be read to-

Thus, the bond furnished by Kostelac was given for the express purpose of guaranteeing the faithful performance of all the terms and conditions of the contract. The district court found as a fact (R. 79) and held (R. 82) that Kostelac's liability was within the intent and purpose of the bid and performance bond and that the Maryland Casualty Company was liable to the United States as surety on the bond.

In their "Statement of Points" on appeal (R. 205–208) Kostelac and his surety state that (R. 208):

> There was no proof of breach of the conditions of the bond sued upon herein, but the evidence conclusively shows that there was no breach of such bond.

The basis for this assertion is far from clear. Kostelac, of course, repudiated his five-year contract after only five and one-half months of part performance. In the face of such conduct, neither Kostelac nor his surety can seriously suggest that there has been a "faithful performance of all the terms and conditions" of the contract as guaranteed by the bond.[14] Any argument to the contrary is transparently unsubstantial.

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gether to determine the surety's obligation. *Martin* v. *National Surety Co.*, 300 U. S. 588; *Century Indemnity Co.* v. *United States*, 236 F. 2d 752, 754.

[14] Kostelac and the Maryland Casualty Company, in denying liability on the bond, rely upon a literal interpretation of the conditions spelled out in the bond. Their view, which would render the bond a nullity, ignores the intent and purpose of the bond as well as the contract provision pursuant to which it was furnished.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the district court, as to Kostelac, should be modified so as to award the United States full compensation for its loss, $104,363.40. As to the Maryland Casualty Company, the judgment should be modified by increasing its liability to $40,000, the full amount guaranteed by the bond.

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U. S. GOVERNMENT PRINTING OFFICE: 1957

No. 15,343.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

MIKE H. KOSTELAC and MARYLAND CASUALTY COMPANY, a Corporation,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

UNITED STATES OF AMERICA,
Appellant,

v.

MIKE H. KOSTELAC and MARYLAND CASUALTY COMPANY, a Corporation,
Appellees.

Appeals from the United States District Court for the Western District of Washington, Southern Division.

BRIEF OF APPELLANTS,

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FILED

SUBJECT INDEX.

Cases Cited.

Textbooks Cited.

Rules Cited.

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JURISDICTION.

The District Court was vested with jurisdiction of this cause, in which the Government is plaintiff (Complaint, Tr. 3-8), by reason of Title 28, U. S. Code, Section 1345.

This Court has jurisdiction to review the final judgment of the District Court (Tr. 81-83), by reason of the Notice of Appeal duly filed (Tr. 83-84), and under Title 28, U. S. Code, Section 1291.

STATEMENT OF FACTS.

This is an action by the United States against Mike H. Kostelac and Maryland Casualty Company, a corporation. The Complaint (Tr. 3-8) alleges execution of a contract between defendant Kostelac and plaintiff for removal by said defendant of garbage from Fort Lewis, Washington for five years (Tr. 4); furnishing of a bid bond therefor by defendant Maryland Casualty Company in the sum of $40,000 (Tr. 5); failure of defendant Kostelac to pay for certain of such garbage removed by him (Tr. 6); and plaintiff being obliged to enter into a new contract with one DeBoer to remove the garbage from Fort Lewis for the balance of the term of over 4½ years (Tr. 6); such relet price being $80,102.24 less than the price in Kostelac's contract; and the contract price of the garbage hauled away by Kostelac being $24,261.16, making a total claim of $104,363.40 against Kostelac, and $40,000 against the bonding company (Tr. 7), for which judgment was sought (Tr. 8). Defendants filed an Answer and Counterclaim (Tr. 9-18), alleging also among other things a mistake in the entering into the contract (Tr. 14-18).

The principal facts of this case are largely stipulated between the parties in the Pretrial Order (Tr. 53-73), or included in the Exhibits; testimony in the one-day trial was limited to that of defendant Kostelac (Tr. 107-176), who testified principally to a mistake in his Government contract and the steps he took after discovering the mistake; the deposition on Interrogatories of Lt. Col. Robert Ryer III (Tr. 97-106) for defendants, who testified on the principal factual question on the alleged mistake: that garbage at Ft. Lewis was not picked up daily prior to July 1, 1946, when he was Post Food Service Supervisor in charge of such matters (Tr. 100, 101, 103, 105, 106); the testimony of plaintiff's witness, John DeBoer (Tr. 177-191), principally to refute certain statements by defend-

ant Kostelac; and plaintiff's witness, Harry C. Ryan (Tr. 191-194), Chief Clerk at Fort Lewis at the time in question, who testified only that he was not present when the Contracting Officer and defendant Kostelac discussed the amount of garbage.

Defendant Mike H. Kostelac, prior to the year 1946, was engaged in the business of raising hogs at Gig Harbor, Washington, near Tacoma (Tr. 108). He had had three years' previous experience in hog farming, including collection of garbage from Jefferson Barracks in St. Louis, Missouri, and Scott Air Force Base at Belleville, Illinois (Tr. 109). For the one year period ending June 30, 1946, defendant Kostelac had a contract to haul the garbage from Bremerton Naval Base at a fixed price per ton to feed to the hogs on his farm; and the Bremerton contract ended on the date the contract in question at Fort Lewis began (Tr. 108).

Prior to June, 1946, defendant Kostelac had requested the Contracting Officer at Fort Lewis, Major P. P. Maiorano, to place his name upon the roster of bidders for the contract to haul garbage from Fort Lewis (Tr. 110). He intended to haul the garbage temporarily to his farm at Gig Harbor, and gradually convert his operations to a farm close to Fort Lewis, which he had arranged to rent (Tr. 140, 141, 173).

Some time before June 21, 1946, Kostelac received from the Contracting Officer at Fort Lewis a written Invitation to Bid (Tr. 58, 112), which Invitation (being part of contract W-4501-6SC-19 S 497 (Exhibit 1 herein), contains in General Provision No. 5 the following statement:

> "Inspection: Bidders are invited and urged to inspect the property to be sold prior to submitting bids. Property will be available for inspection at the times specified in the invitation . . . In no case will failure to inspect be considered grounds for a claim."

Paragraph No. 3 of the Invitation contains the following: "Inspection dates (see General Provision 5): June 21st to June 26th between the hours of 8 AM to 4:30 PM daily except Sat. and Sun." (Tr. 95). That the inspection by bidders of actual garbage containers, as urged by such written notice to the bidders, and also solicited verbally by Major Maiorano, the Contracting Officer for plaintiff (Tr. 58), was considered by the Contracting Officer an important procedure and step prior to letting the contract, in order to estimate the probable amount of garbage under existing conditions, practices and procedures, and defendant Kostelac was advised by the Contracting Officer of the importance of such inspection of garbage containers (Pretrial Order, Tr. 60, 118).

Defendant Kostelac was informed that inspection of the amount of garbage was important because the bid in question was to be based not upon a fixed price per ton of garbage which would require weighing, but was to be a bid, the price of which would vary according to the number of men stationed at Fort Lewis (Exhibit 1 and Tr. 174-176). In other words the bid by Mr. Kostelac, as requested by the Contracting Officer, and by the Invitation, set a certain price to be paid by Mr. Kostelac "per man per day," so that the amount owed by Kostelac for garbage picked up by him would be calculated by multiplying the unit bid price by the number of men at the time at Fort Lewis (Exhibit 1). It is conceded that this method of bidding was an innovation (Tr. 67).

Because the price to be paid by Kostelac for the garbage would depend upon the number of men, with no assurance as to the amount of garbage that might accumulate from feeding men at Fort Lewis, defendant Kostelac was told and realized the importance of careful inspection of the actual amounts of garbage that were being obtained at that time by one DeBoer (who then had the contract);

and this required examination of the garbage containers (Tr. 117-119). He therefore personally made inspections of garbage containers at Fort Lewis on four different occasions prior to submitting his bid for this contract; on two different occasions during the inspection dates of June 21 to June 26, 1946, referred to above, and also on two prior occasions that month in respect to a prior invitation (Tr. 112, 120-123). When Kostelac first received the invitation to bid on the contract in question, he proceeded in the morning (Tr. 112-113), keeping ahead of the garbage trucks which were carrying away the garbage from Fort Lewis under the contract with DeBoer then in effect. Defendant would keep seven or eight messhalls ahead of the garbage truck, talk to mess sergeants to learn the number of men at the particular messhall (Tr. 113), lean the garbage cans on end, and estimate from apparent weight, volume and appearance the approximate number of pounds of garbage per man per day resulting from operation of the particular messhall (Tr. 114). On that occasion he examined approximately fifteen or twenty messhall garbage containers in each of the three, four or five principal sections at Fort Lewis (Tr. 114). He came to the conclusion, based upon the amount of garbage examined, and the number of men fed at the messhalls, that the average accumulation of garbage equalled more than one pound per day for each man fed (Tr. 113).

Again on the date his bid was to be submitted, June 26, defendant Kostelac again went through the same procedure, going ahead of the trucks, examining about 40 garbage containers in all, and came to the same conclusion that there was regularly being accumulated each day more than one pound per man in garbage at Fort Lewis (Tr. 122-123).

Defendant Kostelac had, on the other two additional occasions in the same month of June, 1946, gone through

the same procedure of inspecting the garbage at messhalls at Fort Lewis, making a total of four inspections (Tr. 112, 120, 121).

The Contracting Officer for plaintiff "stated to defendant Kostelac, prior to his bidding on the contract, that the waste or garbage in said containers should represent a one-day's accumulation thereof" (Pretrial Order, Tr. 60, 115). Defendant Kostelac also knew that the contract for garbage collection covering the preceding year required that garbage be picked up daily at Fort Lewis, and the Contracting Officer in addition discussed with Mr. Kostelac the fact that such preceding contract required garbage to be picked up every day (Tr. 119). The contract then being bid upon by defendant Kostelac also required daily pick-ups (Exhibit 1), which defendant Kostelac knew (Tr. 119). In his discussions with Kostelac, Major Maiorano, the Contracting Officer for plaintiff, was not personally aware of any violations of the daily pick-up requirements, and personally assumed there were daily pick-ups; and accordingly he made the statement to defendant Kostelac that the waste in the containers should represent a one-day's accumulation of garbage (Tr. 60).

Defendant Kostelac relied upon such advice by the Contracting Officer in estimating the amount of garbage, and in preparing his bid proceeded upon the assumption that he had witnessed a one-day accumulation of garbage in the containers on all four of his inspections (Tr. 123). Defendant Kostelac was told at one time by Major Maiorano, the Contracting Officer, that his estimates of the amount of garbage that would be available under the prospective agreement (about 20 tons per day) were too optimistic (Tr. 59, 118, 128). He replied to the Major that he (the Major) had previously told Kostelac there were five or six trucks of garbage per day under existing operations, and each truck hauled four or five tons; whereupon the

Contracting Officer agreed that the 20-ton estimate was a fair figure (Tr. 118, 128). Because of the Major's statement about over-optimism, defendant Kostelac thereafter made the three additional inspections of the garbage containers (Tr. 128-129).

Thereafter defendant Kostelac submitted his bid, which he believed would be at the rate of approximately $4.00 to $5.00 per ton when the market price of hogs was down, up to a maximum of $9.00 or $10.00 per ton when the market price of hogs was high (Tr. 124). Later he discovered that in fact he had bid on a basis that would cost him approximately $20.00 per ton (Tr. 161). Previously Kostelac had paid $4.12 per ton at Bremerton (Tr. 146).

Defendant Kostelac testified that to his knowledge there was no other way he could check on the amount of garbage that would be anticipated under the contract, besides making the inspections which he in fact had made (Tr. 124). The results of his inspections, indicating over one pound per man per day, were generally in line with those experienced at Scott Air Force Base, Jefferson Barracks and Bremerton (Tr. 124), although there may be other differences caused by a cooler climate, and difference in type of food (Tr. 171).

There was a provision placed in the proposed contract by the government stating that the estimated amount of kitchen waste per man per day is .04 pounds (Exhibit 1 and Tr. 124). Defendant Kostelac had discussed this provision with Major Maiorano, the Contracting Officer (Tr. 126-128). The Contracting Officer took Mr. Kostelac to the Food Disbursing Office at Fort Lewis, and Kostelac was told that this provision is in all Government contracts of this type, that no one could ever explain it and that it simply had to be put in the proposed contract (Tr. 127). The Contracting Officer told Kostelac to disregard this

provision in making his bid, which Kostelac did, in fact (Tr. 128). He had calculated that if such estimate of .04 pounds per man per day were correct, this would indicate an average accumulation of garbage of less than two-thirds of an ounce per man for three meals (Tr. 126), and he told the Contract Officer that the peelings off one potato would be more than that (Tr. 127), to which the Contracting Officer agreed and laughed (Tr. 128). The contract also contained a provision that it was in no sense conditioned on either the amount of waste to be collected, the number of kitchens or families, or the number of men subsisted from time to time (Exhibit 1).

Defendant Kostelac was the only bidder on the contract in question, and the price bid by him on June 26, 1946 was higher than any other comparable bids ever received at Fort Lewis, either before or after the day of said contract (Pretrial Order, Tr. 64).

Defendant Kostelac entered upon performance of the contract in question on July 1, 1946. On the first few days of operation under the contract, the garbage cans were so full, or over-flowing, that the trucks were unable to cover the entire Fort on any of those days (Tr. 130). On about the 5th day, however, defendant Kostelac found that he obtained only ten or eleven tons, when he first collected garbage from the entire Fort in a one-day period (Tr. 130, 131). And the garbage cans were only about half as full as when he had examined them in preparing his bid (Tr. 172-173). Kostelac immediately contacted Major Maiorano, the Contracting Officer, and told him that "something looked funny"; that the garbage was not there (Tr. 131). The Contracting Officer said he was going to investigate (Tr. 131). Also, Kostelac was asked by a mess sergeant, "What, are you picking this up every day now?" (Tr. 131, 132.) Thereafter defendant Kostelac contacted Major Maiorano, the Contracting Officer, over a dozen

times about the apparent mistake (Tr. 134). He went to the Contracting Officer and wanted him to see if they could do something about the mistake (Tr. 132). Defendant Kostelac told the Contracting Officer he had been misled, that the garbage was not picked up every day when he had examined the containers, and he had bid on the expectation of obtaining twice the amount of garbage, since it was a two-days' accumulation of garbage he had examined, instead of a one-day accumulation (Tr. 132). The Army Officers at Fort Lewis said they were not authorized to do anything about the mistake, but would have to refer it to higher Army authority in San Francisco (Tr. 138). Thereupon the Contracting Officer and Mr. Kostelac drew up another contract to be sent to the Sixth Army Headquarters in San Francisco for approval (Tr. 132). This new contract was on or about July 24, 1946, and provided a new (renegotiated) price to said contract at a reduced sliding scale submitted by defendant Kostelac; such contract was subject to the approval of the Headquarters, Sixth Army, but upon referral of the contract to said Headquarters or on about August 2, 1946, said Headquarters made the determination that the plaintiff had certain rights under the previous contract that could not be released by the War Department (Tr. 61, 62). Such decision was confirmed by the Director of Service, Supply and Procurement in Washington, D. C., on or about September 27, 1946. That while negotiations were being carried on, defendant Kostelac "persistently pursued efforts to have the Government modify, adjust or cancel his contract, addressing his communications in that respect to both the military and congressional authorities" (Pretrial Stipulation, Tr. 61). His attorney had given written notice to the Contracting Officer on July 18th, 1946 that Kostelac considered he had made a mistake, and advising of the difficulties of operating profitably from so small an amount of garbage (Tr. 61, 133). The attorney's letter requested that either

the contract be corrected, or that defendant Kostelac get out of the contract (Tr. 133). The officers at Fort Lewis would never tell Kostelac whether or not they agreed with him that the garbage cans had been misleading (Tr. 138). Defendant Kostelac flew to the Sixth Army Headquarters in San Francisco twice; the first time the office was being moved, and the second time, two weeks later, he was told to go to Washington, D. C., which he did (Tr. 133). He was unable to find anyone in Washington who knew anything about the contract, and was told to go back to St. Louis, and return to Washington in two or three weeks and contact his Congressman, Mr. M. L. Price (Tr. 133). Mr. Price's secretary accompanied defendant Kostelac, and spent two days on the matter; no one in Washington was able to find the files for him, and no one had any information about his case, or helped him in any respect; this was also true of San Francisco (Tr. 134). Mr. Kostelac spent over $2,000 on these trips (Tr. 136-137).

In drawing up the proposed new contract for defendant Kostelac, the Contracting Officer had asked him how much he thought the price should be per man per month, if Mr. Kostelac bid on the basis of examining a two days' supply of garbage rather than a one day supply; defendant Kostelac and the Contracting Officer drew up a sliding scale that was not exactly a bid, but a "proposal for a bid, or something," the way the Contracting Officer explained it; the Contracting Officer drew it up himself, and stated to defendant Kostelac, "I will send this to Frisco" (Tr. 135). This new proposed contract was, in fact, sent to San Francisco by the Contracting Officer with his recommendation that it be approved by the Government (Tr. 135).

During the period these negotiations were going on concerning the contract, defendant Kostelac continued to pick up the garbage from Fort Lewis, and did so until the

Contracting Officer notified him on November 27, 1946, that December 15, 1946, was to be his last day (Exhibits 4 and 5 and Tr. 140). Defendant Kostelac had had discussions with Major Maiorano, the Contracting Officer, as to whether Kostelac should continue to take the garbage out of Fort Lewis during this period, and the Contracting Officer told him he had to, and told him that it would go against Kostelac a lot more if Kostelac defaulted on the contract and stopped hauling the garbage (Tr. 140). For the first three or four weeks Mr. Kostelac was able to use about two-thirds of the garbage at his Gig Harbor farm, before his new farm was to be built at Troy, Washington, near Fort Lewis (Tr. 140-141), but thereafter he was compelled to dump all of the garbage during the entire period to December 15th, at a complete loss to defendant Kostelac (Tr. 158, 173).

On December 15, 1946, the Government re-let the contract to DeBoer for $80,102.24 less than Kostelac's price for the rest of the term.

John DeBoer, who has had the garbage-hauling contract at Fort Lewis about 24 years (Tr. 185) except for very brief periods when Kostelac and another man got the contract (Tr. 186), and who took over again when Kostelac's contract was ended in December of 1946 (Tr. 188), testified for the Government that before the Kostelac contract he got 35 to 40 tons of garbage a day from Fort Lewis (Tr. 180); that there had been complaints that his drivers had not picked up garbage (Tr. 181); that as a rule this was because of foreign material in the garbage (Tr. 182); that DeBoer, himself, never picked up garbage at Fort Lewis (Tr. 183); that he fed about 6,000 hogs in June, 1946 (Tr. 182), but that he would also feed his hogs grain, besides the garbage (Tr. 183); that he used to get paid to haul away the garbage, and he believed it was as recently as 1945 (Tr. 186); and in response to a brief

question by the Court, he testified that he had dismantled his hog ranch on July 1, 1946 (Tr. 191) and had laid off his men; that the Government only contacted him 48 hours ahead of time in December, 1946, and that the price he offered to pay, and bid for garbage for the remaining 4½ years on the contract was a low price because he would have to dump a certain amount of garbage initially in setting up the farm again (Tr. 191).

Harry Ryan testified for the Government that he was Chief Clerk at Fort Lewis when the contract in question was let, and that he never heard Major Maiorano make any representation as to the amount of garbage; but that he was not always present when the Major and Mr. Kostelac talked (Tr. 192-194).

The Court in its opinion (Tr. 195-199), Findings of Fact, Conclusions of Law and Judgment (Tr. 74-83), found "no question" that Kostelac had made an error in his bid, but "felt obliged to hold" defendants Kostelac and the Bonding Company liable for the contract price of the garbage from July 1, 1946 to December 15, 1946 (an agreed total of $30,716.18, including interest) on the theory that Kostelac had not promptly rescinded or requested rescission of the contract (Tr. 78). The Court stated that under the circumstances it was persuaded that no further damages (of the $104,363.40 plus interest of about $30,000 sought by plaintiff) should be allowed (Tr. 79). An appeal to this Court was taken by defendants on August 7, 1956, and a cross-appeal taken by plaintiff, the Government, on August 16, 1956 (Tr. 83-85).

SPECIFICATION OF ERRORS.

Defendants contend that the trial Court erred in finding that defendant Kostelac had lost his right to rescind his contract, and that the Court's Findings (Tr. 74-80) in that regard are erroneous on the several grounds listed immediately below in the Summary of Argument, under Point I; that the Court's decision was based upon matters not pleaded or set out in the Pretrial Order herein (Point II, infra); that liability on the bond was not proved (Point III, infra); and that the Findings of the trial Court on this equitable counter-claim may be reviewed and modified by this Court (Point IV, infra).

SUMMARY OF ARGUMENT.

I. DEFENDANT KOSTELAC DID NOT LOSE HIS RIGHT TO RESCIND THE CONTRACT BY REASON OF WAIVER, ACQUIESCENCE OR ESTOPPEL.

A. The Lower Court's Decision Is Based Upon an Erroneous Assumption of Fact.

B. Defendant Kostelac's Conduct Was at All Times Consistent With His Claim That the Contract Should Be Rescinded.

C. Defendant Kostelac Reasonably Assumed That the Government Was Not Insisting Upon Immediate Strict Cancellation or Rescission.

D. During the Period in Question Defendant Kostelac and the Government Were Negotiating a Settlement.

E. Both the Government and Said Defendant Expected and Intended a Delay in Submitting the Tangled Contract to Higher Governmental Authorities.

F. Defendant Kostelac Was Expressly Told by the Contracting Officer to Continue Collecting Garbage Pending Efforts to Correct the Contract.

G. Defendant Kostelac Was Also Morally Obligated to Continue Hauling Garbage Pending Settlement.

H. Said Defendant Did Not Have Knowledge of Facts Requisite to Create Waiver.

I. To Bar Defendant Kostelac From This Relief Would Be Extremely Inequitable Under the Circumstances.

J. There Is No Issue as to Any Failure by Defendant Kostelac to Act After November 27, 1946.

II. THE DEFENSE OF WAIVER, ACQUIESCENCE AND ESTOPPEL IS NOT AVAILABLE BECAUSE NOT PLEADED AND NOT IN PRE-TRIAL ORDER.

A. **Such Defense to Plaintiff's Counterclaim for Rescission Was Not Pleaded by Plaintiff.**

B. **The Pre-Trial Order Listed All the Issues, and Contained No Provision for Such Contention.**

III. PLAINTIFF MAY NOT RECOVER ON THE BOND IN THIS CASE.

IV. THIS COURT MAY REVIEW AND MODIFY THE FINDINGS OF THE TRIAL COURT ON THE ISSUES HEREIN RAISED.

ARGUMENT.

I. DEFENDANT KOSTELAC DID NOT LOSE HIS RIGHT TO RESCIND THE CONTRACT BY REASON OF WAIVER, ACQUIESCENCE OR ESTOPPEL.

A. The Lower Court's Decision Is Based Upon an Erroneous Assumption of Fact.

Before arguing the merits of this question, as to whether there was a "waiver," "acquiescence" or "estoppel," we wish to make it clear that such issue was never pleaded in this case, was not among the specific issues stipulated and agreed to with finality in the Pretrial Order herein, and therefore should not be considered in this case. However, we discuss this matter as Point II, because of our equally strong conviction as to the merits of this issue of acquiescence, which we believe is supported by long lines of legal authorities and precedents.

The lower Court in this case first of all rightly found upon overwhelming evidence that the contract between defendant Kostelac and the Government was voidable by said defendant by reason of mistake (Paragraphs V and X, Findings of Fact, Tr. 76, 78-79):

> "There is no question but that defendant Kostelac made an error or miscalculation when he prepared his bid. . . . It seems to the Court that Kostelac might well have secured appropriate relief by rescission had he promptly sought it, that there may well have been a substantial and important mistake as to the quantity of garbage that might be expected from the Fort. . . ."

The Court, however, went further, on an issue never injected into the case by the pleadings, Pretrial stipula-

tion or by any evidence, as follows (Paragraph VII, Findings of Fact, Tr. 76-77):

> "In this instance, defendant Kostelac did not demand either rescission or reformation. What he sought in effect was renegotiation which was a matter for the administrative judgment and discretion of the Army authorities and not a matter for the Court. It is not within the province of the Court to renegotiate a contract for these parties."

The Court's reluctance to so rule is indicated by the language in the opinion (Tr. 197-8):

> "Now this brings us down to the proposition that without demanding rescission or reformation, which, of course, was never applicable anyway, but at most asserting renegotiation which was refused ultimately by the Army authorities, Mr. Kostelac continued with the collection of the garbage until December 15, and *I feel obliged to hold that in doing so, this collection was under the contract which had not been rescinded and which Kostelac hadn't asked to be rescinded.*" (Emphasis supplied.)

We submit that this ruling of the lower Court is in error for all nine reasons set out in this Point I (any one of which would be sufficient to permit relief to defendants).

First, we respectfully submit that this holding is based upon an erroneous assumption or fallacy concerning one fact in particular. This erroneous assumption of fact is that "defendant Kostelac did not demand either rescission or reformation," but that he merely sought "renegotiation" of his contract. This error is conclusively established by reference to the *stipulated and agreed facts* as set out in the Pretrial Order, Paragraph 18, page 61 of the transcript, as follows:

"That defendant persistently pursued efforts to have the Government *modify, adjust OR cancel his said contract . . . AND* during which time, on or about July 24, 1946, defendant Kostelac undertook renegotiation of his contract with the Contracting Officer at a reduced sliding scale submitted by him, which renegotiation was subject to its approval by the Headquarters Sixth Army . . ." (Emphasis supplied.)

This alternative demand of Kostelac was also in exact accordance with a letter sent by Kostelac's attorney to the Contracting Officer in July, 1946, requesting that *"EITHER" the contract be corrected or rescinded* (Tr. 133).

We submit that there simply can be no question about this stipulated fact that defendant Kostelac asked in the alternative for a correction of the contract price *OR* a cancellation or rescission of the contract. And the alternative nature of the demand is not changed by reason of the fact that the first step thereunder was taken by the Contracting Officer, who submitted for approval of the Sixth Army Headquarters a new written contract, drafted by the Contracting Officer, which would correct this mistake in the price of the garbage (Tr. 61-62, 132, 135).

There is, of course, a tremendous difference between a case of notifying the other party to a contract that, in the alternative, you must either have the contract price corrected *or* the contract cancelled or rescinded, and a case where a person makes no claim to a rescission of the contract, and by his words or conduct leads the other party to believe that he is willing to proceed under the existing contract, and is merely asking, as a favor, that his contract price be increased. The latter is apparently what the lower Court assumed Mr. Kostelac was doing, whereas the former is conclusively established, by the agreed evidence, to have been Kostelac's stand at all times in question herein.

B. Defendant Kostelac's Conduct Was at All Times Consistent With His Claim That the Contract Should Be Rescinded.

The ruling of the lower Court in this case that defendant Kostelac lost his right to rescind, is in a field in which the law is extremely well settled by ample precedents on all phases of the problem. We, therefore, first seek basic definitions of this type of defense to rescission. The terms used in cases involving such loss of rights are defined as "waiver", "estoppel", "acquiescence" or "election", and are summarized in *Herman On Estoppel and Res Judicata,* Vol. 2, page 1157, Sec. 1029, as follows:

> "The same rules are applicable as to election, acquiescence and ratification. . . . Election, ratification and acquiescence are prominant elements in the creation of equitable estoppels and may be consolidated under the general term of estoppel by conduct."

The exhaustive treatise by *Black on "Rescission and Cancellation"* Vol. 3, Sec. 608, pp. 1469-70, similarly defines such a defense to rescission:

> "Without explicit admissions or declarations, an estoppel to rescind may be raised against a party in consequence of his acts or conduct amounting to a ratification of the contract, *or which are consistent only with the theory that he recognizes it or ratifies it.*" (Emphasis supplied.)

Kerr on "Fraud and Mistake", 6th Edition, l. c. 432, summarizes the defense as follows:

> "It is not necessary, in order to render a transaction unimpeachable that any positive act of confirmation or release should take place. It is enough if proof can be given of a *fixed and unbiased determination not to impeach the transaction.* This may

be proved either by acts, evidencing acquiescence, or by the mere lapse of time during which the transaction has been allowed to stand. The proper meaning of acquiescence is quiescence under such circumstances *that assent may be reasonably inferred from it. It means being content not to oppose.*" (Emphasis supplied.)

We believe and contend that from these very basic definitions of a waiver of rights in this type of situation, defendant Kostelac has not waived, abandoned, or acquiesced in this voidable contract. The record is replete with protests by this defendant. When he first received a suspicion that a mistake had been made, he immediately contacted Major Maiorano, the Contracting Officer (Tr. 131). His attorney wrote the Contracting Officer requesting that *either* the contract be corrected *or* rescinded (Tr. 133). Mr. Kostelac thereafter contacted the Contracting Officer over a dozen times (Tr. 134). As stated above, the parties have stipulated that thereafter "defendant *persistently pursued efforts* to have the Government modify, adjust *OR* cancel his said contract" (Tr. 61). The parties have stipulated that the Contracting Officer in fact approved correction of the mistake, and sent a new contract to the Sixth Army Headquarters (Tr. 61). As shown in the statement of facts, defendant Kostelac made two trips to San Francisco and two trips to Washington, D. C., finally even calling in his Congressman, in making every effort during the delay period to correct the mistaken contract as the equitable alternative to rescission (Tr. 133-134).

What more could Kostelac reasonably have done to make it clear that he *did not acquiesce* in the mistaken contract?

Considering the circumstances and the surrounding situation known to both parties, it would have been bizarre, if not utterly fantastic, for defendant Kostelac to have

acquiesced. This is not a case where a buyer (and Kostelac was a buyer of garbage in this case) has a debatable decision to make whether or not to go ahead with a voidable contract. Here, to go ahead with the contract obviously meant *complete ruin and bankruptcy to Kostelac,* by paying for five years a price not only stipulated to be "higher than any other comparable bids received at Fort Lewis" (Tr. 64), but shown to be a price more than twice the value of the garbage: about *$20.00* per ton instead of *$8.00 to $10.00* (Tr. 161). That this suit is for $104,363.40 on a contract originally estimated by the Contracting Officer at a gross figure for all garbage of $200,000 (Ex. 1, p. 1) brings this point home vividly.

The Washington Supreme Court has held protests much weaker than those made by Mr. Kostelac will be construed as sufficient notice of a desire to rescind. In *Schroeder v. Hotel Commercial Co.* (1915), 84 Wash. 685, 147 Pac. 417, the defendant, purchaser of a defective piano, did not at any time specifically request rescission (return of the piano), much less demand it. He merely argued about the defect (considerably less vigorously than Kostelac protested the mistake in this case). The seller (an agent, like the Contracting Officer in this case) took up the matter with higher authority (his principal), just as the Contracting Officer did in Mr. Kostelac's case. The buyer refused to make payments on the voidable contract pending the dispute, just as Kostelac also refused to do on his contract involving a mistaken price (Pretrial Order, paragraph 7, Tr. 55, paragraph 8, Tr. 55-56, and paragraph 18, Tr. 62). The delay in that case was for 1½ years, as compared to about four months in Kostelac's case. And there were no alternative demands in that case like the one made by Kostelac.

Referring to (1) the buyer's *protesting* about the defect, and (2) his *refusal* to pay, the Court squarely held (l. c. 420, Pac. Rep.):

"This IN ITSELF was, under the circumstances, a sufficient notice of the rescission."

We therefore believe that, according to basic definitions thereof, an utter lack of acquiescence, waiver or estoppel is established with finality by the agreed facts in this case.

C. Defendant Kostelac Reasonably Assumed That the Government Was Not Insisting Upon Immediate Strict Cancellation or Rescission.

The lower Court in this case, in Paragraph VII of the Findings of Fact (Tr. 77), has held that defendant Kostelac should have "taken the position promptly and within a reasonable time that there was no contract at all because of the alleged mistake," and should have "then *demanded* that the contract be declared at an end and that he be freed from its obligations. . . . " (Emphasis supplied.)

As stated in our Point I, B, we believe defendant Kostelac did take a definite stand (meantime giving the Government a choice of alternatives). Further, we believe that the Court overlooked agreed facts in this case that demonstrate there was no necessity for such an arbitrary, adamant and uncompromising attitude on the part of defendant Kostelac, because of the view and approach of the other party to the contract, the Government Contracting Officer.

The agreed facts show that almost immediately after the matter was brought to the attention of the Contracting Officer, efforts were undertaken to make a fair adjustment in the contract because of the mistake, and *within a few days* of the prompt written notice from the defendant Kostelac's attorney, a proposed new contract was *actually drafted by the Contracting Officer* and forwarded to his superior authorities in San Francisco (Tr. 135).

Under such circumstances it would have been entirely out of keeping *and utterly reprehensible* if defendant

Kostelac had during this period made some harsh demand upon the Government, when the Contracting Officer was at that very time undertaking to remedy the mistake in the contract in an obviously equitable fashion.

The rule that a purchaser or contractor need not make a formal demand for rescission when the other party appears to be remedying the situation has long been established by the Courts. *Black on Rescission and Cancellation,* 2nd Ed., Vol. 2, Sec. 544, p. 1344, excuses failure of a buyer to insist on rescission where he

> ". . . labored under a mistaken impression that . . . *he would be able to obtain redress in other ways and without the necessity of suing for rescission.*" (Emphasis supplied.)

From long ago the precedent in *Rheinstrom v. Elk Brewing Co.,* 28 Pa. Super. Ct. 519, has ruled in analogous chattel cases that:

> "The purchaser of a defective machine will not be held to a prompt rescission where he has been misled by the seller into believing that a prompt rescission would not be insisted upon."

And in analogous corporate stock cases, it is stated in Cook on Corporations (8th Ed.), Vol. 1, Sec. 162, p. 542, that:

> "Acquiescence or affirmance does not bind the stockholder [whose subscription was obtained by fraud] *if induced by a reasonable expectation on his part* that the fraud would be remedied." (Emphasis supplied.)

(We hasten to mention that the great majority of rescission cases involve fraud or active misrepresentation, and that of course, in quoting such cases, we do not intimate or suggest any such conduct in the present case.)

In the Delaware case of *Dietrich v. Badders* (1913), 4 Boyce 499, 90 Atl. 47, where the statements of plaintiff

were the reason for failure to return a defective mare immediately, the Court found that prompt rescission was unnecessary since

> " . . . the *plaintiff* [seller] has then waived her right to have the mare returned within the time that first might be considered reasonable after the defendants discovered that she was not sound" (l. c. 51, Atl. Rep.).

The most abundant analogous cases setting forth this rule of law are found in the long line of cases involving return of defective merchandise or chattels. Typical of all these authorities is *Salina Implement & Seed Co. v. Haley,* 77 Kan. 72, 93 Pac. 579. The Court there found that under the circumstances in that case the defendant-purchaser was not to be expected to return the machine while tests were being made on it to see if it could be made to work. Although the "testing" of the machine by that particular buyer covered an unusually long period of time, the Court in no uncertain language held that:

> "*The plaintiff* [*seller*] *is hardly in a position to insist* that the test [of the machine by the buyer] was unreasonably long *when it and its agents were assisting Haley* [defendant-buyer] *in making the test until the last day,* and holding out assurance that they could remedy the defects. . . . " (Emphasis supplied.)

The Courts have frequently found that the seller in such a situation, either intentionally or entirely unintentionally, may have "lulled the purchaser into a sense of security" either by acts or deeds. Typical of such cases is *Stone v. Molby Boiler Co.* (N. Y., 1921), 195 App. Div. 68, 185 N. Y. S. 651, where the defendant claimed that plaintiff (purchaser of a defective boiler) had "waived his right to repudiate the contract" by not demanding rescission for a long period of time. The Court found that the purchaser in that case (like Mr. Kostelac in the present case)

left no stones unturned during the alleged delay period to make the boiler work, and that the seller had also cooperated in this effort. Overruling the seller's claim of waiver, the Court stated emphatically (l. c. 655, N. Y. S. Rep.):

> " . . . *There is a rule, as old as the law of any civilized nation,* that when by acts or statements one party lulls another into a sense of security as to his existing right, *such party cannot then take advantage of the other party, to his detriment and thus advantage the alluring party, in his own behalf, to destroy those rights.*
>
> "Under the circumstances the holding of the jury that he did not give notice of his rescission within a reasonable time, *was against the weight of the evidence . . . The plaintiff did everything he could, working, according to suggestions and instructions of the defendant to make the boiler a success.*" (Emphasis supplied.)

D. During the Period in Question Defendant Kostelac and the Government Were Negotiating a Settlement.

The Courts hold very closely to the established principle that a person having the right to declare a contract void does not lose that right by alleged acquiescence, waiver or estoppel, when his alleged failure resulted from good faith negotiations to settle the difficulty or correct the defect in the contract.

Indicative of how far the Courts will go in refusing to penalize a buyer in such a case is the decision in *La Force et al. v. Caspian Realty Co.* (1928), 242 Mich. 646, 219 N. W. 668. In that case real estate was sold to plaintiff by metes and bounds at a time when the ground was covered with snow. Upon the snow melting it was found that twenty feet of the ground was occupied by another house, previously sold by defendant to another party. Protracted

negotiations were undertaken, whereby defendant made an effort to obtain for plaintiff twenty feet from an alley on the other side of the property. At no time did defendant give any assurances to plaintiff that such substitute strip could be obtained. Defendant even tried to get the city to vacate the alley, and thereafter rested many months without taking any further action. Meantime plaintiff proceeded to make improvements on the premises, rent the premises, and make payments on the purchase price to defendant. Despite all this, the Court refused to hold that plaintiff had waived his right to rescind the contract (l. c. 669, N. W. Rep.):

> "But it is said that plaintiffs, under use and occupation, inclusive of receipt of rentals and also in making improvements, could not, after many months, rescind. *During negotiations toward an amicable adjustment of acknowledged and just rights of plaintiffs* to have the land sold them or the quantity thereof supplied, they had the right to use the property in their possession, take the avails thereof inclusive of rentals, maintain the status quo by payments on the contract, *all subject however to judicial adjustment if amicable adjustment failed and rescission followed.* (Emphasis supplied.)

Waiver under similar circumstances was claimed in the case of *In re Impel Mfg. Co.* (U. S. Court of Appeals, 6th Cir.), 200 Fed. (2d) 112. The opinion of the lower Court (108 Fed. Supp. 469), specifically approved on appeal, also refused to penalize the plaintiff in that case, since he delayed because he was

> ". . . putting forth efforts or carrying on *negotiations to obtain a compliance with the contract, restitution OR a peaceful settlement.*" (Emphasis supplied.)

A situation quite analogous to the case at bar is found in *Berry v. Wood, etc., Mach. Co.* (St. L. Ct. of App., 1895),

62 Mo. App. 41 (no Regional citation), where the plaintiff bought a defective machine through the local agent of defendant. Having a right to rescind the agreement, plaintiff made an offer to the agent that he would keep the machine for one year if the agent's principal (defendant) would insure its proper working; otherwise plaintiff would return it. Just as the Contracting Officer in the present case submitted Kostelac's request for alternative action to his higher authority (the 6th Army Headquarters), so in the *Berry* case, the agent submitted the alternative proposition to his principal. The purchaser was held not to have waived or lost his right to rescind because of his inaction during the period of such negotiations.

In *Fred Macey Co. v. Macey,* 143 Mich. 138, 106 N. W. 722, where the party entitled to rescind the contract waited for two years and was claimed thereby to have waived his right, the rule was stated that all that was necessary was that such party

> ". . . protested promptly after discovering the fraud, and entered into negotiations for a peaceful settlement which failed" (l. c. 727, N. W. Rep.).

E. Both the Government and Said Defendant Expected and Intended a Delay in Submitting the Tangled Contract to Higher Governmental Authorities.

It is perhaps an understatement to say that both the Government and Kostelac expected a substantial delay in submitting the unusual problems raised by this contract to higher Governmental authorities, in view of the well known (and necessary) procedural requirements or red tape before a Government contract can be so modified. And it is, of course, common knowledge that during all this time from July to December, 1946, shortly after the end of the war, these Government agencies were flooded with termination negotiations almost beyond comprehen-

sion. Into this setting was injected the case of the contract of Mike Kostelac. Of course, both parties expected Mr. Kostelac not to give up collecting garbage while this delay was being incurred and the Contracting Officer directed him to continue collection of the garbage (Tr. 140). The whole purpose of submitting the mistake to higher authority was to see if by a fair and equitable change in the mistaken contract price Mr. Kostelac could not be enabled to carry out his long five-year contract. Certainly, the actions of the parties, if not their words, also, evidenced a *clearly implied understanding* such as the following:

> "We will try to work this out fairly, and if we fail, it will then be a question for the courts as to whether Mike Kostelac will be liable for this high price for garbage in view of the mistake."

Many courts, including the Washington courts, have dealt with analagous situations where delay was to be expected. In *Macey et ux. v. Furman et ux.* (1916), 90 Wash. 580, 156 Pac. 548, the deed described the wrong real estate and the sellers requested time to see their lawyers. They did nothing, however, for eight months and at the trial claimed that inaction during that period by the buyers constituted an estoppel and laches. At page 549, Pac. Rep., the Supreme Court of Washington stated:

> "*Respondents were justified in waiting a reasonable time for an answer.* The answer never came . . . Appellants by their own inaction inducing respondents to delay are estopped to invoke that delay as an estoppel against rescission. Nor did respondents' failure to abandon possession of the land estop them to rescind." (Emphasis supplied.)

So, also, in the case of *Read v. Loftus* (Kans., 1910), 82 Kan. 485, 108 Pac. 850, another case involving defective title to real estate, the parties both agreed to and contemplated that a suit to quiet title, or some other proceeding

would be taken by the seller. Almost a year elapsed, in which the seller did nothing. It was held that the buyer had not thereby waived his right to attack the contract as voidable. The language on page 852 (Pac. Rep.) shows the similarity between the delay there and the delay in the present case as the matter was being submitted to higher authority:

> "The nature of the remedy which they (sellers) proposed, namely, a suit to quiet title, *would necessarily require time and a reasonable delay for that purpose should not be construed as a waiver until some act was done or notice given evincing an intention to refuse to comply with the promise.* (Emphasis supplied.)

Delays that are foreseeable by the parties ordinarily present an excuse for a buyer failing to take action. Somewhat analogous, also, are cases involving defective products, where long delays may be expected in order to determine whether the products will be made to work. Hence, in the very recent case of *Telex, Inc., v. Schaeffer* (Ct. of Appeals, 8th Cir., April, 1956), 233 Fed. (2d) 259, where the buyer of radios tried for a long time unsuccessfully to make them work, the Court indignantly ruled (l. c. 202):

> "*It comes with poor grace* for appellant [seller] now to urge that appellee should be denied a recovery for his *patient efforts* to make a success of the appellant's wares." (Emphasis supplied.)

F. Defendant Kostelac Was Expressly Told by the Contracting Officer to Continue Collecting Garbage Pending Efforts to Correct the Contract.

On page 140 of the Transcript the testimony shows that Major Maiorano, the Contracting Officer, directed defendant Kostelac to continue to haul the garbage from Fort Lewis pending the efforts to adjust the contract price.

The Contracting Officer went even further, and made a veiled threat that "it would go against" Mr. Kostelac if he stopped hauling the garbage during that period (Tr. 140). It is of course logical that the Contracting Officer would want defendant Kostelac to continue hauling the garbage during such period, because the whole purpose of forwarding the matter to the Sixth Army Headquarters was to permit Kostelac to continue at the right price.

The Courts have frequently dealt with a situation where a request by one party has been the cause for inaction by the party entitled to avoid the contract. The decisions have often been quite strongly worded in such cases. In the case of *Randal v. Mitchell Motorcar Co.* (Penna., 1919), 263 Pa. 428, 106 Atl. 783, the Court expressed its views as to whether one making such a request could thereafter claim the other party had waived rescission. The Court said flatly (l. c. 784, Atl. Rep.):

> *"He who request another to act, or not to act, cannot punish that other for complying with the request."* (Emphasis supplied.)

Counsel for the seller in that case argued against the rule that a person may thus be lulled into security. As to this contention of counsel, the Court stated that it is:

> ". . . *neither good law nor good morals, so far as relates to a delay, as here, at the request of defendant.*" (Emphasis supplied.)

A Law Review Note in 15 Nebraska Law Bulletin 198-200 discusses this situation in connection with the case of *Slagle v. Securities Investment Corp.* (Nebraska, 1936), 268 N. W. 294, involving an innocent misrepresentation concerning a defective truck. In discussing the law in such case, the writer states (l. c. 199):

> "Delay in exercising the right to rescind does not operate as waiver of such right *where the delay is*

caused by the seller or representor, and since it was induced by the adverse party he cannot take advantage of a delay which he himself has caused or to which he has contributed. Absent this qualification the seller could make promises and attempts to fix the chattel for a sufficiently long time and by such inducements *destroy the buyer's right of rescission.*" (Emphasis supplied.)

The Law Review writer states that the Slagle case "is supported by the weight of authority. *Analysis of the facts shows that no other position would be equitable.*" (Emphasis supplied.) The writer then collates the numerous leading decisions on the exact point, including *Schroeder v. Hotel Commercial Co.* (1915), 84 Wash. 685, 147 Pac. 417.

G. Defendant Kostelac Was Also Morally Obligated to Continue Hauling Garbage Pending Settlement.

We earnestly submit that if defendant Kostelac had, upon becoming suspicious that there was a basis for declaring his contract invalid, arbitrarily, selfishly and contrary to the Contracting Officer's request, and without giving the Government an opportunity to do the fair thing, quit the job completely, taking away all his trucks and refused to carry away the accumulating garbage at Fort Lewis, he would be guilty of acting as no honorable or fair-minded person should act. He had been the only bidder on this particular contract, the other qualified person having disbanded his hog farm on July 1, 1946 (Tr. 191). There had fallen into his hands the responsibility for avoiding an unsanitary, if not dangerously unhealthful situation for approximately 40,000 American soldiers, and we can but suggest that it is to Mr. Kostelac's credit that he took this responsibility seriously, as the evidence showed he was doing a much more thorough job than had been done in the past (Tr. 103).

The Supreme Court of Washington has passed upon a very analogous situation in the case of *Bishop v. T. Ryan Construction Co. et al.* (1919), 106 Wash. 254, 180 Pac. 126, where the plaintiff, like Kostelac, had a contract to haul materials: in that case sand, gravel and cement used in the construction of a road. The defendant committed a breach of contract which permitted plaintiff to cancel the hauling contract. However, plaintiff continued to haul for some time thereafter, even though not requested to do so there. We submit that the Court's dealing with the alleged defense of waiver under those circumstances has a definite bearing on the situation in the present case (l. c. 131, Pac. Rep.):

> "He (plaintiff) testified, and his testimony is all that there is upon the question, that he continued to so haul because the contractor was then actively engaged with a crew of men in the prosecution of the work, *and no one else had been employed to take his place,* and he did not wish to cause any greater annoyance or loss to the contractor than he could reasonably avoid. Clearly this ought not to be held a waiver of his cancellation of the contract . . . *it was but the exercise of common decency, and certainly the law will be slow in penalizing such an act.*" (Emphasis supplied.)

We believe that the act of continuing to haul the garbage, as strenuously requested by the Contracting Officer, was not only common decency on the part of Mr. Kostelac, but in contemplating the chaos that would result from rotting garbage all over the camp, we believe that defendant Kostelac has fulfilled a compelling moral obligation. And when it is considered that during nearly all the time in question he had to dump the garbage at a complete financial loss to himself (Tr. 158-159, 173), it would seem most unfair to subject him to further penalty.

H. Said Defendant Did Not Have Knowledge of Facts Requisite to Create Waiver.

Even if defendant Kostelac had in fact acquiesced in the mistaken contract price (which we deny, and which the evidence also refutes), such acquiescence would still not be a bar to his right to avoid the contract, since defendant did not have full knowledge of the facts.

We refer here specifically to the question of whether or not the garbage which defendant Kostelac examined prior to bidding on four different occasions represented a one-day accumulation or a two-day accumulation, on which clear proof would be a sine qua non for rescission. We now know, after the trial of the case, by the positive and irrefutable deposition testimony of Col. Robert Ryer (Tr. pp. 97-106) that the garbage was not picked up daily, but every other day. Col. Ryer, who was Post Food Service Supervisor (Tr. 98), was the one man at Fort Lewis who was fully in charge of this phase of mess hall operation under the Contracting Officer, including receiving and investigating complaints (Tr. 98).

Defendant Kostelac was in an entirely different position from the Government as to knowledge of such fact. All he could tell, when the quantity of garbage was less than he had estimated, was that "something looked funny" (Tr. 131). Then Kostelac encountered a Mess Sergeant who expressed surprise at daily pick-ups, and made the remark, "How come you are picking it up every day?" (Tr. 132.) Mr. Kostelac confronted Major Maiorano, the Contracting Officer, who stated that he would investigate the matter and find out about it (Tr. 131). On the matter of the attitude of the Army Officers at Fort Lewis after defendant Kostelac's claim of mistake was made, the following questions were put to defendant (Tr. 138):

> "Q. Did you talk to them [the Army Officers at Fort Lewis] at that time as to whether or not the garbage cans had been misleading?

A. Yes, I did.

Q. *And did they tell you their views on that, whether they agreed or disagreed with you?*

A. *No, they didn't.*''

Although defendant Kostelac was thus left completely in the dark as far as proof of operations inside the camp were concerned, he was caused to feel that he was right, since the Contracting Officer recommended that the contract be changed, and forwarded this recommendation to his superior officers in San Francisco, together with a new contract, actually drafted by the Contracting Officer, subject to such approval (Tr. 132, 61).

That same doubt as to the facts which were peculiarly in the knowledge of the officials at Fort Lewis continued almost to the date of trial of this action. Apparently the Contracting Officer never made complete proof available even to the United States Attorney in this action, since the U. S. Attorney could at the most stipulate only as to the:

> '' . . . *inability* [of Army officials] to ascertain whether or not daily pick-ups of garbage were actually made . . . '' (Tr. 64)

and

> '' . . . that the Government admits *it may be the fact* that all the garbage was not picked up every day at the time and place in question'' (Tr. 60).

And the information given to the United States Attorney indicated only:

> '' . . . that the Government was unable to find any witness or evidence to refute the contention of the defendant Kostelac that pick-ups of garbage at such time and place were not made daily'' (Tr. 59).

As will be seen from the record, such limited concessions by the Government on this issue made it perilous to our

defense of rescission for mutual mistake to attempt to set aside this contract without "clear and convincing proof" of such mistake. We thereupon immediately took the deposition of Col. Ryer, the top officer under Major Maiorano at Fort Lewis, whose name was divulged to defendants in this action (Tr. 32) after a long and painful process of interrogatories, investigations and Motion to Compel Answer to Interrogatories (Tr. 27-32).

The testimony of Col. Ryer, set out in the Transcript on pages 97 through 106, removes any suggestion of a doubt on the subject of how frequently garbage had been picked up at the time in question. Col. Ryer was in full charge of this particular matter at Fort Lewis, is still in the service of the Government (Tr. 97), and would have no motive to falsify or exaggerate under these circumstances, and was qualified by his own personal observations made at Fort Lewis every day during about half of his hours on duty. The garbage simply was not picked up daily. The lower Court was so convinced by this testimony, and the testimony of Mr. Kostelac that the Court stated in Paragraph V of its Findings of Facts:

> "*There is no question* but that defendant Kostelac made an error or miscalculation when he prepared his bid on the contract for garbage removal from Fort Lewis. . . ." (Emphasis supplied.)

Under these circumstances, during the period subsequent to July 1, 1956, defendant Kostelac was lacking in the convincing proof required by the law to set aside the contract for mistake, although the Government, through Col. Ryer, the head of this department, had full knowledge of the facts to establish this right of rescission in Mr. Kostelac. In fact Col. Ryer was contacted in the summer of 1946 in an *investigation by the Government* on this exact question in connection with the Kostelac contract (Tr. 103-104).

Under such circumstances, the Courts unanimously hold that even if the party entitled to rescind expressly waives or acquiesces in the contract, his right to rescind cannot be lost until he acquires this knowledge and proof requisite to rescission, which the other party possesses.

The United States Supreme Court has specifically passed upon this exact point, in language leaving no doubt on the subject. In the case of *Pence v. Langdon* (1878), 99 U. S. 578, 25 L. Ed. 420, involving a rescission of the sale of mining stock because of misrepresentations, acquiescence or waiver by the purchaser was set up as a defense to rescission. On page 581, the Court stated:

> "Before the plaintiff was required to affirm or rescind the contract, he must be shown to have had actual knowledge of the imposition practiced upon him. It is not enough to show that he might have known or suspected it from data within his reach. . . .
>
> "Acquiescence and waiver are always questions of fact. There can be neither without knowledge. . . . *Current suspicion and rumor are not enough. There must be knowledge of facts which will enable the party to take effectual action. NOTHING SHORT OF THIS WILL DO.*"

The United States Supreme Court has even applied this doctrine to a case of ignorance of the *law,* in *College Point Boat Corp. v. United States* (1924), 267 U. S. 12, 69 L. Ed. 491. In that case the Government authorities were wholly unaware of the fact that they could terminate a particular contract without paying anticipated profits, and went to great lengths to close out the contract on a different basis. In spite of all the Government had done, *the Court still permitted it to set up this defense when suit was brought against it,* holding that rights could not be waived unless the party involved fully understood those rights (l. c. 16):

"Ignorance of its right doubtless prevented the Navy Department from taking, shortly after the Armistice, the course which would have resulted legally in cancelling the contract at that time. But the right to cancel was not lost by mere delay in exercising it. . . ."

In *Mudsill Mining Co. v. Watrous* (U. S. Court of App., 6th Cir., 1894), 61 Fed. 163, where a waiver of the right to rescind was also claimed, the Court held that such waiver could not be found until such time as the buyer's belief had

". . . acquired the solid foundation of knowledge" (l. c. 185).

In *Humbert v. Larson* (1896), 99 Iowa 275, 68 N. W. 703, the defendants were sued on notes executed for the purchase of a stallion. The defendants had some rather good evidence of the physical incapacity of the animal, since they knew that the plaintiff previously had attempted to sell it, but had been required to take it back from that previous purchaser. Obviously defendants were waiting to see how the animal turned out. The plaintiff strenuously opposed the defendants' plea to rescind the contract, saying that "by reason of their (defendants') delay they elected to stand by and perform their contract." After observing that defendant may have had suspicions concerning the animal, the Court remarked that:

"Defendants were not, under such circumstances, required to act upon mere rumors or suspicions. They were justified in waiting further developments."

Numerous authorities are also assembled in 9 *American Jurisprudence,* "Cancellation of Instruments," Sec. 47, p. 391.

I. To Bar Defendant Kostelac From This Relief Would Be Extremely Inequitable Under the Circumstances.

If it could be found (which we urgently deny) that defendant Kostelac somehow did not follow the path of greatest wisdom when suddenly confronted with this baffling experience, we sincerely believe that the penalty put upon him in this case becomes entirely unfair when all equitable considerations are weighed in connection with Mr. Kostelac's equitable counterclaim. The prompt action by the defendant when he discovered that something "looked funny" (Tr. 131), his constant pestering of the Contracting Officer to get the facts (Tr. 134, 132), the stipulated fact that he "persistently pursued efforts to have the Government modify, adjust or cancel his said contract, addressing his communications in that respect to both the military and congressional authorities" (Tr. 61), his spending about $2,000.00 in making all the long trips (Tr. 136-137), his frustrating experiences with large bureaus that were unable to give him any answer, and referred him to other bureaus (Tr. 133), his straightforwardness in telling the Government that he asked *either* for a correction of the mistake, *or* the rescission of his contract (Tr. pp. 61, 133), the dire consequences of complete financial ruin that would result from waiver of this defense, because of the enormity of the contract entered into in error, the fact that the Government would obtain only a windfall if it prevails (getting over twice the usual value of the products being sold), the fact that the Government through Col. Ryer, its top assistant to the Contracting Officer in this particular field, and through its own Investigating Committee, had full knowledge of facts which it did not disclose to the defendant (Tr. 103-104) and the fact that the defendant was acting just the way the Contracting Officer wanted him to in continuing to carry away the garbage, and avoid any danger to the health of the 40,000 troops, and finally, that Mr. Kostelac acted

at all times the way any man of honor and integrity would act when confronted suddenly with a terrible situation which was not the result of any fault on his part.

Equitable considerations of this type were the basis for the decision in *Strother v. Lehigh et al.* (1911), 151 Iowa 214, 130 N. W. 1019, where the buyer of real estate that seemed to have a defect in the title made the mistake of actually bringing suit himself to remedy this defective title, alleging in that action that she was the owner of the property. The Court, however, refused to recognize the otherwise obvious application of the doctrine of waiver in such a case. Conceding that such action by the buyer might ordinarily be considered a waiver of the right to rescind, the Court concluded that

> ". . . it would be inequitable to so treat it in this case."

That reasonable latitude is given in a proper case is shown in *Black on Rescission and Cancellation,* 2nd Ed., Vol. 2, sec. 546, p. 1348:

> ". . . while one seeking to rescind is ordinarily required to act with reasonable promptness, a liberal extension of this rule is allowable *where the delay has not been willful nor exercised for an unfair purpose.*"

J. There Is No Issue as to Any Failure by Defendant Kostelac to Act After November 27, 1946.

Thus far we have considered only whether defendant Kostelac should have taken any particular action during the period of some four months between the time of his first suspicion of the mistake (Tr. 131) and November 27, 1946, which was the date upon which the Government formally made its finding against Kostelac and notified him that Kostelac's contract was being re-let on December 15, 1946 (Exhibits 4 and 5 and Tr. 55).

It is probably axiomatic that at all times after November 27, 1946, there was no need for Kostelac to notify the Government that he would not continue under his contract, or that he considered the contract cancelled; nor did he need to bring legal action. The contract was, in fact, put to an end by the Government, and the only question remaining was the legal consequence thereof in view of the mistake in the contract.

So that there can be no uncertainty about this point however, and so the picture will be complete, we point out that there has never been the slightest hint, intimation or suggestion of criticism of Kostelac by the Government or by the lower Court in this action on the ground that defendant Kostelac should have taken any action after November 27, 1946. There is not a word in the pleadings, the motions, the stipulated facts and issues in the Pretrial Order, the evidence, the opinion of the Court, or the Court's Findings of Fact or Conclusions of Law. This simply was not in the case, and, accordingly, evidence was not introduced as to any negotiations between Kostelac and the Government after November 27, 1946, as to whether the Government should bring suit after waiting five years (the end of the original contract), whether a declaratory judgment suit could be brought, etc., etc.

That defendant Kostelac could assert his equitable claim to rescission in a suit by the Government on the contract, in the event the Government decided to try to collect under all the circumstances, is also Hornbook law. *Professor Pomeroy* in *"Equity Jurisprudence,"* Fifth Ed., Vol. 3, Sec. 868, pp. 380-381, states:

> "I shall . . . enumerate the various modes in which the equitable jurisdiction may be exercised, and the various forms of remedy which may be granted, on the occasion of mistake. . . . The jurisdiction may be exercised either *defensively* or *affirmatively*. . . .

In States which have adopted the reformed procedure, the equitable jurisdiction may also be invoked, if necessary, by defendants in legal actions. This may be done by means of equitable defenses which simply defeat the plaintiff's legal cause of action, or by means of equitable counterclaims or cross-complaints which demand for the defendant some affirmative relief, as reformation or cancellation." (Emphasis is by the author.)

II. THE DEFENSE OF WAIVER, ACQUIESCENCE AND ESTOPPEL IS NOT AVAILABLE BECAUSE NOT PLEADED AND NOT IN PRE-TRIAL ORDER.

A. Such Defense to Plaintiff's Counterclaim for Rescission Was Not Pleaded by Plaintiff.

Plaintiff's reply to the counterclaim of defendant is set out on pages 33 to 36 of the Transcript. No suggestion whatsoever of an issue of waiver, estoppel or acquiescence was raised at any place in this pleading. The plaintiff limited itself solely to the issue of whether or not the alleged mistake was sufficient to avoid the contract, whether defendant Kostelac was guilty of negligence in connection with the making of the mistake and whether two specifically listed provisions in the contract preclude rescission for mistake.

It is now well established in the Federal Courts that affirmative defenses of the type herein discussed are not available at the trial or on appeal in such a case, if not pleaded. *Rule 8, Rules of Civil Procedure, Title 28, U. S. C. A., p. 253,* is as follows:

"(c) *Affirmative Defenses.* In pleading to a preceding pleading, a party shall set forth affirmatively . . . estoppel, . . . laches, . . . release, . . . waiver, and any other matter constituting an avoidance or affirmative defense . . . "

There would appear to be no ambiguity at all in this rule, and the Courts have clearly so held. *Bowles v. Capitol Packing Co.* (Ct. of Appeals, 10th Cir., 1944), 143 Fed. (2d) 87; *Wackerle v. Pacific Employers Insurance Company* (Court of Appeals, 8th Cir., 1955), 219 Fed. (2d) 1.

No exceptions to this rule are found, unless the parties have somehow waived such pleading requirement. In fact in one case the issue of estoppel was held to be unavailable, even though it was pleaded, since the pleading was defective, and did not contain all the necessary elements. *Fancher v. Clark* (U. S. D. C., D. Colo., 1954), 127 Fed. Supp. 452.

B. The Pre-Trial Order Listed All the Issues, and Contained No Provision for Such Contention.

In the trial of this case, largely because of geographical considerations, the parties entered into a very complete stipulation as to facts, which was incorporated into the formal Pretrial Order on May 11, 1956 (Tr. 53 through 73). Again, any reference whatsoever to any waiver or loss by defendant Kostelac of his right to avoid or rescind the contract is completely lacking from the entire document. In addition, the parties set forth their contentions beginning at page 65, through page 70. The identical issues referred to above in the pleadings were the only issues listed as *"Plaintiff's Contentions"* on the rescission issue (Tr. 67-68).

Those "Contentions of the Parties," as set forth in the Pretrial Order, were the only issues in the case, and the following statement was contained therein (Tr. 70):

> *"Issues of Law and Fact.*
>
> *"The issues of law and fact are set forth in the respective contentions of the parties, as hereinabove stated."*

At the end of the Pretrial Order (Tr. 73) the following statement is made:

> "The foregoing Pretrial Order has been approved by the parties hereto, as evidenced by the signatures of their counsel hereon, and this order is hereby entered, as a result of which the pleading pass out of the case, and *this pretrial order shall not be amended except by Order of the Court pursuant to agreement of the parties or to prevent manifest injustice.*" (Emphasis supplied.)

Pre-Trial procedure is established by Rule 16 of the Federal Rules of Civil Procedure, Title 28, U. S. C. A., page 623. Among other statements, in said Rule 16 is the following:

> ". . . and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice".

Here, again, it is difficult to see how there could be any ambiguity about the Pretrial order and the agreements set out therein or any ambiguity about Federal Rule 16. We note furthermore that such a Pretrial Order has been construed in the case of *Fancher v. Clark*, supra, under this Point II, and held to preclude issues not raised therein (l. c. 458):

> "Finally, the pre-trial stipulation and order in specifying the issues reserved for determination at the trial, do not refer to any claimed estoppel."

We have set out in the Transcript the Motion for Summary Judgment (Tr. 19-26), and the long Memorandum answer of plaintiff to such Motion (Tr. 27-52), to show that no such issue of waiver, estoppel or acquiescence was ever raised therein either. It would be difficult for the parties in any case to make it more emphatically clear what the issues were in the case.

III. PLAINTIFF MAY NOT RECOVER ON THE BOND IN THIS CASE.

Although we feel strongly that the points raised above would fully preclude plaintiff from recovery herein, there is another defense that should also deny recovery under the bid bond which plaintiff seeks to enforce by this action. This defense is that the bond herein contains a condition which has not been proved by plaintiff.

This bid bond, attached to Exhibit 1 herein, provides for liability by defendants, in the event of default, the amount of liability being "the difference between the amount specified in said bid and the amount for which the Government may procure the required work and/or supplies, *if the latter amount be in excess of the former* . . ."

Contrary to such express provision of this bond, the evidence conclusively shows that the re-let contract was for a smaller amount of money than the Kostelac contract, rather than "in excess" thereof, and therefore there has been a failure of proof of liability under the bond. (See Exhibit 3, showing that Kostelac's bid price was $158,339.64 whereas the re-let contract was for only $53,976.24. *And the Court has entered a judgment for the amount by which the re-let contract is less than Kostelac's contract.*

The plaintiff chose to ignore the wording in the bond in this case, and we presume (without pleading or proof) that plaintiff considered this wording to be an error of some sort. Although the matter was specifically raised by us in our pleadings (Tr. 10), our motion for Summary Judgment (Tr. 22-23) and our "Contentions" in the Pretrial Order (Tr. 70), nevertheless, plaintiff has never sought a reformation of the bond, alleged any grounds therefore, or shown by any proof that the wrong bond

form was used (or whatever plaintiff's explanation might be for the bond saying what it does).

We think that plaintiff may not intentionally ignore and disregard the fact that their evidence fails to show liability under the provisions of this bond. We feel that we as defendants are entitled to have a mistake alleged, if there was a mistake, and to have proof (actually it should be "clear and convincing") as to why the bond should be reformed, as plaintiff obviously feels it must be. We do not feel that the words "in excess of" can be construed to mean "less than", without supporting allegations and proof, and therefore a judgment on the bond cannot stand.

Lumber Underwriters of New York v. Rife (1915), 237 U. S. 605, 59 L. Ed. 1140, 35 S. C. 717;

Northern Assurance Company of London v. Grand View Building Association (1906), 203 U. S. 106, 51 L. Ed. 109, 27 S. C. 27;

Springfield Fire and Marine Ins. Company v. Martin (Ct. of Appeals, 5th Cir., 1935), 77 Fed. (2d) 492;

Aetna Indemnity Co. v. Baltimore, etc. Ry. Co. (Md., 1912), 117 Md. 523, 84 Atl. 166;

Garage Equipment Mfg. Co. v. Danielson (Wisc., 1913), 156 Wis. 90, 144 N. W. 284.

IV. THIS COURT MAY REVIEW AND MODIFY THE FINDINGS OF THE TRIAL COURT ON THE ISSUES HEREIN RAISED.

We have tried to show throughout this brief that almost all facts of any consequence on this appeal by defendants Kostelac and the Bonding Company are without any dispute, being based upon the five exhibits and the stipulations of the parties in the Pretrial Order. In fact, there is little relevant testimony on this appeal subject to any controversy. If this Court agrees with our views as to the law expressed herein, then this Court has jurisdiction to

reverse the judgment, since our points set out above are most of them based entirely upon stipulated facts.

Rule 52 (a), Rules of Civil Procedure, U. S. C. A., Title 28;

United States v. U. S. Gypsum Co. (1947), 333 U. S. 364, 92 L. Ed. 746, 68 Sup. Ct. 529;

Cyclopedia of Federal Procedure, 2nd Ed., Vol. 12, Sec. 6212, p. 271 et seq.

In *United States v. Gypsum Co.,* supra, the United States Supreme Court discussed at some length the effect of Rule 52 (a), which incorporated the prevailing equity practice into non-jury law cases. Findings by the trial Court were never conclusive on equity appeals, although great weight would be given to findings "when dependent upon oral testimony where the candor and credibility of the witness would best be judged" (l. c. 395).

The Supreme Court held that on an equity or non-jury appeal the Findings may be reversed if "clearly erroneous," and defined that term as follows (l. c. 395):

> "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the *definite and firm conviction that a mistake has been committed.*"

Sometimes reversals in such cases are put on a related ground that the question of "waiver," "estoppel" or "acquiescence" "is a question of law when the facts are ascertained."

Ray Motor Co. v. Stanyan (Me., 1923), 123 Me. 346, 122 Atl. 874;

Macey et ux. v. Furman (Wash., 1916), 90 Wash. 580, 156 Pac. 548;

Mudsill Mining Co. v. Watrous (Ct. of App., 6th Cir., 1894), 61 Fed. 163.

CONCLUSION.

For the reasons set out above it is respectfully submitted that the judgment of the lower Court should be reversed, with directions to enter judgment for both defendants.

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No. 15,343.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

MIKE H. KOSTELAC and MARYLAND CASUALTY COMPANY, a Corporation,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

UNITED STATES OF AMERICA,
Appellant,

v.

MIKE H. KOSTELAC and MARYLAND CASUALTY COMPANY, a Corporation,
Appellees.

Appeals from the United States District Court for the Western District of Washington, Southern Division.

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Kostelac and Maryland Casualty Company.

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SUBJECT INDEX.

Cases Cited.

Textbooks and Treatises Cited.

No. 15,343.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

MIKE H. KOSTELAC and MARYLAND CASUALTY COMPANY, a Corporation,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

UNITED STATES OF AMERICA,
Appellant,

v.

MIKE H. KOSTELAC and MARYLAND CASUALTY COMPANY, a Corporation,
Appellees.

Appeals from the United States District Court for the Western District of Washington, Southern Division.

ANSWER BRIEF OF DEFENDANTS-APPELLANTS,

Kostelac and Maryland Casualty Company.

SUMMARY OF ARGUMENT.

We believe that plaintiff has found it cannot justify the decision of the lower Court on the basis stated by that Court, to-wit: that defendant Kostelac acquiesced in the contract mistake by his failure to "demand" a recission. The cases are believed to hold otherwise.

Consequently, counsel for plaintiff seek to uphold the decision of the trial Court on three grounds, on all of which the Court has previously ruled contrary to their views. The first ground deals with the motive of defendant Kostelac in attempting to get out of his contract, and we show that the evidence strongly supports the trial Court's upholding of Kostelac's motive. Counsel's effort to impute other motives by reason of Ceiling Prices and failure to start up the new hog farm we believe are simply not warranted by the evidence, and the trial Court was in the best position to pass upon disputed factual testimony.

Next plaintiff would support the lower Court's decision by an assertion that defendant Kostelac was negligent. The evidence is overwhelmingly against such contention, and in fact shows plaintiff's agent to be in great part responsible for the error. Further, even negligence in such circumstances may not deprive one of a right to rescind.

Finally plaintiff attempts to justify the decision by reason of two provisions in the Invitation to Bid. The first, purporting to be an estimate that each man wastes only .04 pounds per day, is not binding in this case, and the testimony shows it rightly was never taken seriously. It is not even a good "admission" to be considered by the trier of the facts. The other provision in the Invitation was one which warned the bidders that there might be great variances in the number of men at Fort Lewis *after* the contract began, and stated that the contract price would not be conditioned thereon. We submit that plaintiff has taken certain of these words out of context in an effort to show that this clause was intended to be a forfeiture of a bidder's right to rescind a mistaken contract. The lower Court agreed with us on the interpretation of both of these provisions. If we are correct in this assump-

tion, we must also be correct in claiming there is no relation, by analogy or otherwise, between this latter contract clause and an "as is, where is" contract provision. The latter, at any rate, could apply only where specific, existing, property is involved.

The brief reference to the "acquiescence" theory by counsel for plaintiff is much different from the lower Court's grounds. Counsel require only a "prompt assertion of the right to rescind", which undoubtedly was fully proved in the present case. "Prejudicial delay", an essential element of plaintiff's theory, is lacking from the pleadings, Pre-Trial stipulation and proof. And under the circumstance plaintiff, by requesting, and even insisting upon, the delay involved, has never been in a position to, and never has heretofore, claimed such a prejudicial delay.

ARGUMENT.

A reading of plaintiff's original brief herein makes it plain that counsel find it impossible to justify under the decisions, Federal or State (and there is no conflict among them), the sole basis given by the trial Court for its ruling, viz.: that defendant Kostelac waived his right to rescind the contract because of "acquiescence", and his failure to "demand that the contract be declared at an end" (Tr. 196). No discussion of this acquiescence theory is made by counsel in the entire brief until and except the two pages (25-27), on Point II, C, and, as we will show later, this point is entirely different from the ground of the lower Court.

Counsel, therefore, primarily attempt to uphold defendants' liability upon three other and distinctly different grounds, none of which were found for plaintiff in the lower Court, and on each of which the lower Court held contrary to counsel's views. We believe that the trial Court's Findings on each of these three other points are based upon very substantial (we think overwhelming) evidence, largely from seeing and hearing the witnesses in Court, but also fortified by the stipulation of the parties in the Pre-Trial Order.

I. PLAINTIFF'S IMPLICATIONS OF OTHER MOTIVES TO DEFENDANT KOSTELAC TO RESCIND CONTRACT ARE CONTRARY TO THE EVIDENCE.

A. **Lifting of Ceiling Prices Improved the Contract, Rather Than Make It Burdensome.**

The first of these three new points embraces attempts to assign to Kostelac other motives besides this contractual mistake for wanting to get out of this agreement. In pre-

paring this appeal, counsel have gone to considerable lengths for the first time to delve into the question of Ceiling Hog Prices in the Federal Register, for the purpose of reconstructing some ulterior, secret motive on the part of defendant Kostelac, and hence to discredit his sworn testimony which the lower Court believed.

We cannot understand how counsel consider an argument of this calibre valid on this appeal, much less of such importance as to constitute the first major argument in the brief. It would be a questionable "argument to the jury" in a lower-Court hearing, in view of the fact that there was *not a word of evidence introduced* concerning this rise in market prices, and not even a hint to defendant Kostelac on the long cross-examination (Tr. 144-171), that this price rise was claimed to have been a disadvantage to him.

This point could have validity only if the evidence introduced showed that as the market price of hogs went up and Kostelac *got more money for his hogs*, the corresponding slight increase in the price of garbage *would cost the defendant more than the market price rise*. There is not only no scintilla of evidence to this effect, but the assumption is absolutely incorrect. The evidence shows that these market price increases are of great benefit to hog farmers, and that defendant Kostelac wanted nothing more than for these prices to rise exactly as they did (Tr. 175). The end of price control was obviously anything but a surprise to the parties, since they entered into a sliding-scale bid, which could apply only if prices could go up (Exhibit 1).

The fallacy of trying to impeach a witness for the first time on appeal, and the fallacy of this type of empirical reasoning can even be proved mathematically by a study of the relevant portion of this sliding scale as shown in the contract in question (Exhibit 1):

Selling Price of Hogs on Seattle Market	Price Bid by Kostelac in Contract
$0.15 per pound	$0.09 per man per mo.
0.16 per pound	0.10 per man per mo.
0.17 per pound	0.12 per man per mo.
0.18 per pound	0.135 per man per mo.
0.19 per pound	0.14 per man per mo.
0.20 per pound	0.145 per man per mo.

Any increase in market price of hogs above 20¢ per pound obviously would require no increase in the contract price, and would be a definite pecuniary advantage to Mr. Kostelac.

The average price of hogs, as shown in Exhibit 3, rose from $.158 per pound under O. P. A. Ceilings (Plaintiff's brief, p. 15); reached this very top figure of 20¢ per pound immediately during the first month of the contract; and *continued to climb, so that by the month of October, 1946, while this contract dispute was in full force, the average market price was $.26 per pound.* Defendant Kostelac was therefore by October getting a bonus of six cents per pound over and above the 20¢ price on which his maximum contract price was based. He was paying not a cent more for garbage because of this additional six-cent increase in the market value of his hogs. As a matter of fact, Exhibit 3 shows the market price of hogs was on its way up, and went up constantly for the next year, and the market even got up to 31¢ per pound in that time.

This means that at the very time during which plaintiff now attempts for the first time to attribute an ulterior motive to Kostelac to get out of his contract, Kostelac was already making 26¢ per pound for his hogs, which included this 6¢ bonus. Far from seeking "escape from the burdens of his contract" for the motive suggested by counsel on page 17 of their brief, Kostelac would have had a very good contract by reason of the lifting of OPA Ceiling

Prices, if the original mistake therein had not caused him to double his price.

Plaintiff's own figures, therefore, rather than impugn defendant's motive, furnish further convincing proof of the existence of an original, grave error in the contract.

B. Kostelac's Delay in Setting Up New Farm Close to Fort Lewis Was the Effect of the Contract Dispute, Not a Cause.

Similarly plaintiff seeks to impugn the motives of defendant Kostelac, in spite of the lower Court's finding in Kostelac's favor on that point, by claiming that the defendant could not perform his contract because he had no hogs. This is a distortion of the facts, and confuses cause with effect. And it starts out with the premise that a man would prefer to dump garbage for 5½ months on the ground (about three million pounds, as we figure it), rather than operate a farm.

The testimony did not show such an absurdity, but showed that defendant Kostelac, in getting the Fort Lewis contract, had planned and arranged to operate on a different farm from the one at Gig Harbor (Tr. 173). This Gig Harbor farm had been near Bremerton, where Kostelac had had the garbage contract for the past year, but was quite a distance from Fort Lewis, and it required "quite an overhead" expense for the double ferry tolls on each trip, and the impractical mileages involved (Tr. 161). The new farm at Roy, Washington, very near Fort Lewis (Tr. 141), had been lined up, and was made available to defendant Kostelac when he bid on the Fort Lewis contract (Tr. 173), and hogs were available for stocking that farm. Plaintiff simply cannot dispute Mr. Kostelac's plan to set up this farm at Roy, Washington, since *Kostelac told the Government about it in his own handwriting on the last page of the contract (Exhibit 1)*!!

For three weeks defendant Kostelac hauled the garbage all the way to Gig Harbor (Tr. 158). After that he closed up his farm there, according to plan, and sold these hogs. However, instead of immediately setting up the new farm near Fort Lewis, he changed his plans and decided temporarily to dump garbage (Tr. 173). Defendant Kostelac testified positively that he made such change in plans *only because of this dispute over his contract* (Tr. 173), and he proceeded to dump the rest of the garbage from then on at a complete loss to himself.

This testimony was believed by the Court, and is certainly plausible. Defendant could hardly be expected to open up the new farm while he was still in the dark as to whether the Government agencies were going to try to impose on him a double price for garbage; and he could scarcely be criticized for deciding to take the relatively small loss (principally in labor) of disposing of the garbage by dumping, rather than start out the entire new enterprise on impossible price terms.

We think he did the honorable and right thing in devoting all his energies to "*persistently pursuing efforts* to have the Government modify, adjust, or cancel his contract" (Tr. 61—Pre-Trial Order), spending over $2,000 in trips, and even asking help from his Congressman. But even these persistent efforts brought nothing. Defendant was put off again and again. More time passed. No action came from the Government Bureaus, until it was the latter part of November, and he was still dumping the garbage at a complete loss while trying to get a decision.

The last one to criticize Mr. Kostelac for holding up his new farm operations and paying out of his own pocket the labor incident to dumping, while he did his utmost to clear up the contract, should be the Government.

C. The Trial Court Believed the Testimony as to Motive, From Seeing the Witnesses and Substantial Evidence.

It goes without saying that the trial court was in the best position to judge defendant Kostelac's motives, from seeing him answer the barrages of questions on the witness stand. We have never seen a witness more straight-forward and honest on the stand, even under the most searching cross-examination (Tr. 144-171), and if there should be any doubt of this, we refer the Court to eleven instances of actual misstatement of his testimony on cross-examination in an effort to trip him up, and in each of which cases he told the whole truth, and never wavered or permitted any misstatements of fact. See: Tr. 151, lines 13-14; Tr. 155, lines 2-3; Tr. 156, line 5; Tr. 156, lines 8-10; Tr. 156, lines 17-18; Tr. 163, last 3 lines; Tr. 164, lines 4-9; Tr. 165, lines 6-7; Tr. 165, line 22; Tr. 165, last 4 lines; and Tr. 170, lines 19-20.

The question of whether defendant Kostelac really made an honest mistake in bidding or whether he had some hidden motive to get out of the contract, as attributed to him by counsel on this appeal, was decided by the lower court in language leaving no room for doubt: "*There is no question* but that defendant Kostelac made an error" (Finding of Fact No. V, Tr. 76). And the trial court determines conclusively the "candor and credibility of a witness" in such a case (*United States v. Gypsum Co.* [1947], 333 U. S. 364, 92 L. Ed. 746, 68 Sup. Ct. 529).

II. DEFENDANT KOSTELAC WAS NOT NEGLIGENT.

A. The Evidence Overwhelmingly Proves This and the Trial Court So Held.

Plaintiff also persists in the contention that defendant Kostelac was guilty of negligence in his inspection of the garbage containers. There are three answers to this.

First, the facts in the case are overwhelmingly against plaintiff. The testimony shows that defendant Kostelac on *four entirely separate occasions* made very complete examinations of the garbage containers, *carefully inspecting each time approximately 40 to 50 garbage cans,* going in each area of the entire Fort, keeping ahead of the trucks, tilting, examining and estimating the weight of each garbage container, and also finding out the number of men served at each mess hall (Tr. 112-114; 120-123). There being no evidence to the contrary, we cannot understand how it can be claimed the lower court was wrong in holding in its Finding of Fact that defendant was entitled to rescind the contract, as against plaintiff's contention of negligence (Finding of Fact X, Tr. 78).

B. **Plaintiff's Own Agent Contributed on Great Part to the Error.**

Second, plaintiff overlooks the stipulated and agreed fact that the Contracting Officer, himself, told Mr. Kostelac that the garbage was a one-day's accumulation (Pretrial Order, Tr. 60). If there was anyone at Fort Lewis on whose word Mr. Kostelac was entitled to rely 100% it was the one man in complete charge of this bidding and contract. In fact it would be foolhardy to doubt the word of the experienced Contracting Officer and seek information from inexperienced subordinates.

The courts have dealt with this situation frequently, where the statements of one party have been the cause of alleged negligence or carelessness on the part of the other party, and the decisions have always excused any such alleged negligence: *Chitty v. Horne-Wilson, Inc.* (Ga., 1955), 92 Ga. App. 716, 89 S. E. (2d) 816; *Richmond Gas Co. v. Baker* (Ind., 1897), 146 Ind. 600, 45 N. E. 1049; *Williams v. Oklahoma Tire & Supply Co.* (U. S. D. C., W. D. Ark., 1949), 85 Fed. Supp. 260.

In the *Richmond Gas Co.* case, supra, the plaintiff was charged by defendant with being extremely careless in paying no heed to the strong odor of escaping gas. However, it was shown that the agent for defendant gas company had assured plaintiff that there was no danger of explosions. The Court said (l. c. 1051):

> "The company could not thus lull the members of the family into a belief in their security, and then, when injury came, turn on the family and *charge them with negligence in relying on the assurance of safety so given by the company itself.*" (Emphasis supplied.)

Under similar facts involving a furnace explosion, the Court in the *Chitty* case, supra, quoted the well established rule (l. c. 819):

> "If a person is without knowledge as to whether a particular thing is true or not, he ordinarily will act at his peril in representing it to be true."

We think these expressions are applicable to the Kostelac case. At any rate, there is overwhelming evidence of due care by Kostelac to back the finding of the lower court.

C. Even Negligent Mistakes, If in Good Faith, Do Not Necessarily Preclude Rescission.

Finally, there is serious doubt as to whether a negligent mistake, made in good faith, and not involving gross carelessness, will prevent the right of rescission. The modern cases tend to permit rescission in such cases: *Spencer v. Patton et ux.* (Washington Supreme Court), 35 Pac. (2d) 768; *Board of Regents v. Cole,* 209 Ky. 761, 273 S. W. 508. The cases cited by plaintiff (Brief, p. 25) as authority on this point do not have any connection with this subject at all.

III. CONTRACT PROVISIONS DO NOT PRECLUDE OR FORFEIT RIGHT OF RESCISSION.

A. The ".04 Lbs. Per Man Per Day" Provision in the Invitation Is Neither Conclusive Nor Sensible.

The third ground on which plaintiff seeks to justify the lower Court's decision (which is also a point decided against plaintiff by the trial Court), is that the Government's Invitation to Bid contained provisions causing a loss or Forfeiture of the right to rescind. First is a provision which plaintiff describes as an "official estimate" (Brief p. 5), that the garbage yield per man at Fort Lewis would be .04 pound per man per day; and therefore plaintiff asserts that defendant Kostelac is not in a position to claim that he estimated any other amount from his examination of the garbage containers.

The first question that comes to mind is, "Why would the Contracting Officer persist in constant urging in his Invitation to Bid, and verbally, that defendant Kostelac make such complete examinations of the garbage containers, if this statement as to garbage yield was intended to be precise and accurate, or binding?"

But the full answer is shown by the testimony and by mathematics: .04 of a pound per man per day equals 4/100 x 16 ounces, or 64/100 ounces, which is less than ⅔ *ounce per man per day!* The garbage at Fort Lewis was in fact, many, many times any such figure (Tr. 164).

This "official estimate" furnished at least a moment in a lighter vein in the serious trial of this action. A reductio ad absurdum showed that according to such an estimate of .04 pounds per man per day, one could calculate all the garbage from the kitchens *for four meals,* including trimmings, parings, shells, skins, peels, rinds

and cores; plus all the waste at the table; plus any and all spoiled, rotted or rejected food; plus any waste from miscalculations as to quantities or left-overs; apportion this on a per-man basis, and the resulting quantity per man for all four meals could be put in an envelope and mailed for 3¢! As the testimony showed, defendant Kostelac told the Contracting Officer that the peelings from one potato would exceed the ⅔rd ounce daily figure, and the Contracting Officer agreed, laughed, and said to disregard this .04 lb. provision in the Invitation (Tr. 127-128), saying no one could explain where such a figure came from (Tr. 127).

The most that could possibly be said for this remarkable figure that some Government employee ordered put in its Invitation to Bid is that, since such figure was never manually deleted from the Invitation, it could be introduced in evidence as some alleged "admission against interest" by Kostelac. It is nowhere claimed that this "estimate" constitutes any type of contractual agreement. Defendant Kostelac was permitted to, and did completely, explain this alleged "admission" to the satisfaction of the trial Court, and the Court has ruled that this contract was subject to rescission by Kostelac had he acted promptly (Tr. 78).

B. The Provision Stating That Contract Is Not Conditioned Upon Future Variances in Amounts or Men at Fort Lewis Was Never Intended to Deal With Original Mistakes in Contract.

Another ground urged by plaintiff for denying to defendant Kostelac his right to rescind this contract entered into by mistake, is that such right of rescission is taken away by another provision in the contract. The provision claimed to have this forfeiting effect is as follows (Exhibit 1, p. 3; Plaintiff's Brief, pp. 3-4):

> "No assurance is given that the quantities of the items or the number of kitchens or families, or the number of men subsisted, as stated herein, *WILL NOT VARY DURING THE LIFE OF THE CONTRACT;* and any contract that may be awarded hereon will in no sense be conditioned on either the amount of waste to be collected, the number of kitchens, or families, or the number of men subsisted, *FROM TIME TO TIME.*"

This point, we maintain, is also devoid of merit. There are nine words contained in the above contractual provisions which plainly militate against plaintiff's contention. These are the words first emphasized in this quotation above. And following these emphasized words is the word "AND" which carries forward the sense of the entire provision, and points out that in view of the possible future variation during the life of the contract, this contract is not to be conditioned upon the amount of waste, number of kitchens, number of families, or number of men *FROM TIME TO TIME.*

How can the purpose of a clause in a contract be made more obvious and plain? The purpose was simply this: the price of garbage was to be based, not on weight, but on the number of men at Fort Lewis (here it became 14½¢ per man per month). The number of men of course at an army camp might "*vary*" greatly "*from time to time during the life of the contract,*" because obviously the Army could not promise that the camp would be used to capacity "*during the life of the contract;*" it might even be put on a stand-by basis. And the number of kitchens and families would depend on the number of men to be stationed at Fort Lewis. This quoted provision of course was inserted to remind the bidders that there might well be a *future* variation in the number of men, families or kitchens "*from time to time*" "*during the life of the contract,*" and the bidder must consider this fact in making his bid.

The broader language, which plaintiff chooses to isolate, that the contract is not "conditioned" on the number of kitchens, families or men, or the amount of waste "from time to time" directly modifies the language immediately preceding it in the very same sentence, and explains that therefore the bidder may not complain, or get out of his contract because the number of men may "*vary from time to time*" "*during the life of the contract*": that is, *AFTER THE DATE THE CONTRACT BEGINS.*

Plaintiff takes some of these quoted words out of their context, and interprets them to mean that the parties agreed that Kostelac *waived and forfeited in advance* all rights which he might otherwise have under the law, including specifically the right to rescind the contract for any mistake *in the original letting of the contract.* Of course the parties did not contract for any such forfeiture, and the lower Court rightly held against plaintiff on this point.

We have serious doubts whether such a forfeiture would be legal (*Williston & Thompson on Contracts,* Revised Edition, Vol. 6, sec. 1722, p. 4863), particularly where plaintiff contributes to or causes the mistake. Regardless of questions of legality, however, the Courts in construing such provisions will apply the following rules:

(a) "Forfeitures by implication or construction are not favored; and a construction entailing a forfeiture will not be given a contract unless no other construction is reasonably possible . . . The contract will not be construed to provide for a forfeiture unless it is clear, from the language thereof, that the parties intended so to provide . . ." (*Corpus Juris Secundum*, Vol. 17, Sec. 320, pp. 742-743).

(b) "An interpretation which makes the contract or agreement fair and reasonable will be preferred to one which leads to harsh or unreasonable results" (*Williston on Contracts,* supra, Vol. 3, Sec. 620, pp. 1786-1787).

(c) "The Court will likewise endeavor to give a construction most equitable to the parties, and one which will not give one of them an unfair or unreasonable advantage over the other. So that . . . a construction leading to an absurd result should be avoided" (*Corpus Juris Secundum*, Vol. 17, Sec. 319, pp. 739-741).

(d) "Where words . . . bear more than one reasonable meaning an interpretation is preferred which operates more strongly against the party from whom they proceed. . . . " *Restatement of the Law of Contracts*, Vol. 1, Sec. 236, p. 328. (Exhibit 1 shows that this Invitation to Bid was drafted by plaintiff.)

Counsel find solace in the assertion that "The waste yield was an uncertainty inherent in the contract and not capable of precise determination." However this may be, it is basic that any contract, *even if its price be determined by estimating,* must not begin with a mistaken premise which causes an honest bidder to offer more than twice as much as the estimated value of the product. Although we heartily concur that once a fair contract is entered into, both Kostelac and the Government thereafter assume some element of risk in future fluctuations "*during the life of the contract,*" we firmly maintain that both parties are entitled to start out with an original contract free from mistake.

(1) Nor Did This Provision Make the Contract Similar to an "As Is, Where Is" Contract.

On page 22 of their brief, counsel arrive at the unique conclusion that the above "variation" clause "bears a close analogy" to a sale of specific property "As Is, Where Is." We respectfully say that such analogy is anything but close. There are two distinct fallacies to this thinking that are fatal to the conclusion:

1) An "As Is, Where Is" clause by its very nature could not conceivably apply, and has never been suggested by *any Court* as applying, except where specific, tangible property is *actually in existence*. In such a case it is perfectly legal for the purchaser to agree to buy that particular property, exactly "as it is." As the Court pointed out in *Maguire & Co. v. United States* (273 U. S. 67), and in the other cases cited by plaintiff, the contract must make it plain that the buyer was "to take his chance on particular property" that was in existence. Where property is not in existence, however, the usual result would be a "sale by sample" in which the buyer could rescind if the goods deviated at all from the samples. [*See American Elastic Co. v. United States* (C. A. 2), 187 Fed. (2d) 109, also cited by plaintiff.]

2) The other fallacy is to construe this "variation" clause in the Kostelac contract to throw on the buyer the risk of a mistake in his original estimate. As we have shown above, this clause was specifically limited to a particular risk: the risk that the future number of troop throughout the long five-year period would vary greatly "from time to time" "during the life of the contract." Hence it could not be a basis in an argument based on "As Is, Where Is" contracts, because the parties had never so contracted.

IV. PLAINTIFF'S ONLY JUSTIFICATION FOR THE TRIAL COURT'S DECISION AS TO "ACQUIESCENCE" IS CONTRARY TO THE EVIDENCE.

A. "Prompt Assertion of the Right to Rescind" Is Conclusively Shown by the Evidence.

We now come to Plaintiff's Point II, C, beginning on page 25 of their brief, which for the first time deals with the general subject of alleged delay by defendant Kostelac, and the general subject of estoppel, waiver or acqui-

escence. We think it is highly significant that counsel offer no support or precedent for the lower Court's extreme holding that defendant Kostelac should have "demanded" rescission after suspecting a mistake. Instead, counsel limit the "acquiescence" theory as follows (Brief, p. 25):

> *"For a unilateral mistake of fact to serve as a basis for rescission of a contract, it is fundamental that equity requires a PROMPT ASSERTION OF THE RIGHT TO RESCIND once the mistake becomes known."*

There is no doubt that this is a correct statement of the law. Under Point I of our principal brief we cited nine different, well established, legal theories predicated upon the need for a "prompt assertion of the right to rescind," but denying that there must be a "demand" of rescission under the facts of this case.

Have we produced evidence in this case on plaintiff's criterion: a "prompt assertion of the right to rescind"? If there is one fact irrevocably established in this case, by the signed stipulation of the parties, it is this very fact: that Mr. Kostelac *promptly asserted his right to rescind.*

Paragraph 18 of the Pre-Trial Order (Tr. 61) shows that within the first ten days after the beginning of this five-year contract, Kostelac had not only notified the Contracting Officer of this mistake, but had already also directly protested to the Sixth Army Headquaters in San Francisco; that written notice from Kostelac's attorney came a few days later; and "that defendant *persistently pursued efforts* to have the Government *modify, adjust or cancel his said contract,* addressing his communications in that respect to both the military and Congressional authorities. . . ."

Without referring to any of the rest of the mass of evidence on this point, it is patently shown by the stipu-

lated facts that defendant Kostelac certainly *asserted his right to rescind*, at the very earliest date possible, and *persistently* thereafter.

In this connection we cannot leave unanswered an extremely misleading statement on pp. 8-9 of plaintiff's brief, in which counsel assert that "after five and one-half months partial performance . . . Kostelac repudiated the contract. . . ." Such an assertion is directly contrary to the *agreed statement of facts* in the Pre-Trial Order showing that immediately after the contract was started (Tr. 61) Mr. Kostelac protested that a mistake had been made, gave the full notice referred to above, and thereafter "persistently pursued efforts to have the Government modify, adjust or cancel his said contract . . ." The "repudiation" was not by Kostelac but by the *Government*, about four months after the mistake was discovered, who, after the extended negotiations, finally told defendant Kostelac his contract would be relet because of his refusal to pay the mistaken and erroneous contract price (Exhibits 4 and 5; Tr. 55).

B. It Is Also Very Doubtful That This Was Merely a Unilateral Mistake.

(1) Both Parties Were Mistaken About an Essential Fact.

Under plaintiff's theory of the case, under this Point II, C, therefore, defendant Kostelac may rescind, even if the mistake had been unilateral. Therefore it is probable that a determination of unilateral v. mutual mistake need not be made. However, we feel that the nature of the mistake should be clarified, without unduly lengthening this brief.

The mistake in the present case is undoubtedly "mutual", rather than "unilateral." The parties, under the

agreed facts, and the testimony, were *both* mistaken as to the fact of whether the garbage examined was a one-day or a two-day accumulation (Tr. 60, 119, 123). This made a difference of over 100% in the price that should be bid for such garbage, so that the mistake involved an essential fact. And it has now been proved that there was a two-day accumulation, by indisputable testimony of Col. Ryer (Tr. 97-106).

Even in cases where the mistakes are largely unilateral in character (as opposed to the facts of the case at bar), the decisions consider the mistake "mutual", where the other party participated to any extent at all in the error, or possibly even invited the error. *Thwing et al. v. Hall & Ducey Lumber Co.*, 40 Minn. 184, 41 N. W. 815; *Lovell v. City of Altus* (Okla.), 246 Pac. 468.

A case that mirrors in many ways the Kostelac case under its facts is *Scott v. Warner* (N. Y., 1870), 2 Lans. 49, where plaintiff desired to buy a ton of hay from defendant. Defendant did not want to weigh the hay, just as the Government did not want to weigh garbage in the Kostelac case. The defendant in that case "represented that seven feet square by five feet in depth would make a ton, and that he knew this fact. The evidence tended to show that such measurement *did not make more than one-half a ton.*" The Court found a *mutual mistake*, with the following comment (l. c. 51):

> "The defendant assumed to know [these measurements for a ton]. If he did not know, then he misrepresented. If he had been so informed, and so believed, and his representations were founded upon such information and belief . . . then he was clearly mistaken, and led plaintiff into mistake. *The Parties were mutually mistaken as to a material fact. This is the most charitable view of the case.*" (Emphasis supplied.)

Alongside this we quote the Pre-Trial Order in the Kostelac case (Tr. 60):

> "That the Contracting Officer for plaintiff relied upon such provisions of the [previous] contract [requiring daily pick-ups], was not personally aware of any violations of the provisions of said contract, *and accordingly stated to defendant Kostelac, prior to his bidding on the contract that the waste or garbage in said containers should represent a one-day's accumulation thereof . . .*".

(2) Even If the Mistake Were Unilateral, the Cases Permit Rescission Under These Facts.

As stated, since the mistake has been proved to be "mutual" in this case, we shall not unduly extend this brief by discussion of the right to rescind for unilateral mistake: a right possibly not generally understood by many members of the Bar. We merely cite to the Court the leading cases throughout the country, representing the unanimous body of law permitting rescission for unilateral mistake under circumstances such as those in the present case: *Moffett, Hodgkins & Co. v. Rochester*, 178 U. S. 373, 44 L. Ed. 1108, 20 Sup. Ct. Rep. 957; *Donaldson et al., v. Abraham et al.*, 68 Wash. 203, 122 Pac. 1003; *Murray et al., v. Sanderson*, 62 Wash. 477, 114 Pac. 424; *Geremia v. Boyarsky et al.*, 107 Conn. 387, 140 Atl. 749; *School District of Scottsbluff v. Olson Construction Co.*, 153 Neb. 451, 45 N. W. (2d) 164; *St. Nicholas Church v. Kropp*, 135 Minn. 115, 160 N. W. 500; *Kutsche v. Ford*, 222 Mich. 442, 192 N. W. 714; *Chicago, St. P., M. & O. Railroad Co. v. Washburn*, 165 Wis. 125, 161 N. W. 358; *Board of School Com'rs v. Bender* (Ind.), 72 N. E. 154; *Brown v. Bradley* (Texas Civ. App.), 259 S. W. 676; *Smith v. Mackin*, 4 Lans. (N. Y.), 41; *Chaplin v. Korber Realty, Inc.* (New Mexico), 224 Pac. 396; *Board of Regents v. Cole*, 209 Ky. 761, 273 S. W. 508; *59 A. L. R. 809.*

C. **No Change in Circumstances Prejudicial to Plaintiff Was Alleged or Proved.**

It is of course an essential element of this point II, C, of plaintiff, in addition to other requirements, that they must show a change of circumstances resulting in detriment to the Government as the result of this alleged delay, and an inability to obtain fair prices for garbage for this same reason. Two important observations must first be made:

1) Each and every one of our arguments under Point I of our principal brief would apply here, and permit rescission by Kostelac in spite of any claim of prejudicial delay. That is, the undertaking of negotiations for settlement by both parties, the mutual expectation of delay during attempted settlements, the appearance that immediate rescission was not expected, the direction to defendant to continue hauling the garbage pending settlement, lack of knowledge of facts by defendant and other equitable circumstances would all constitute an excuse for delaying rescission, even if plaintiff thereby might incur prejudicial results.

2) This question of plaintiff being prejudiced was not pleaded, was not in the Pre-Trial Order, or any other place in the trial of this case and no evidence on this was introduced by either of the parties. The *sole basis* for the lower Court stating that the delay had been prejudicial to the Government is from testimony on page 191 of the transcript which was in response to a side question asked by the Court of plaintiff's witness, DeBoer. That this was not an issue in the case is emphasized by the Court's statement, "If no one else is going to ask it, I will ask it". The witness then answered that he had previously dismantled his hog ranch, and therefore was not in a position to start up immediately.

However, this contention that the Government was prejudiced, and the reasoning of the lower Court to that effect

is without any support from this very evidence: DeBoer's statement that he had dismantled his hog ranch *ON JULY 1, 1946.*

The error in the assumption that the Government was prejudiced by reason of alleged delay by Kostelac from about *July 10, 1946, to November 27, 1946,* becomes very apparent, when one considers that the *only testimony* on the subject, quoted above, was that *ON JULY 1, 1946, the hog ranch of the only other qualified bidder HAD ALREADY BEEN DISMANTLED* (Tr. 191). No prejudice to the Government could possibly have resulted from a delay that did not begin until *after* Mr. DeBoer had completely dismantled his hog ranch, and by the testimony of DeBoer himself it was July 1, 1946, when he dismantled it (Tr. 191). There was no other person whomsoever able to bid on a garbage contract at Fort Lewis.

Finally, the conclusion is inescapable that for plaintiff to claim prejudicial delay caused by defendant Kostelac is to throw all logic to the Four Winds. It was *plaintiff* whose chief agent *requested* Kostelac to continue to haul the garbage *during the delay period* while the dispute was being settled (Tr. 140); it was *plaintiff* whose chief agent *threatened* defendant Kostelac in insisting that he continue hauling during this interval (Tr. 140); it was *plaintiff* whose chief agent *approved the delay* and personally drafted a new contract *correcting* the obvious mistake in the contract, *requesting approval* from higher Army authority (Tr. 61, 135) to straighten out the tangle (for which plaintiff was not free from blame); and it was *plaintiff* whose agents were so unconcerned about "prejudicial delay" that they relet the contract for the entire 4½-year remaining term on only 48 hours' notice to the only other bidder, despite formal decision to relet the contract 19 days before (Exs. 4 and 5). This fact was elicited from their own witness at the trial (Tr. 191). And plaintiff's agent even failed to

permit defendant to bid on a fair contract on December 15, 1946.

In view of the above, it can be seen why plaintiff neither alleged nor introduced any evidence on the matter of "prejudicial delay."

CONCLUSION.

We contend that plaintiff has failed to uphold the trial Court's sole ground for holding defendants liable, and has failed to present any other ground for such liability. We ask that plaintiff's cross-appeal be denied, and that the judgment be reversed as requested in our appeal.

Respectfully submitted,

EISENHOWER, HUNTER, RAMSDELL & DUNCAN,
TENNEY, DAHMAN & SMITH,
Attorneys for Defendants-Appellants, Mike H. Kostelac and Maryland Casualty Company, a Corporation.

No. 15,343.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

MIKE H. KOSTELAC and MARYLAND CASUALTY COMPANY, a Corporation,
Appellants,
v.
UNITED STATES OF AMERICA,
Appellee.

UNITED STATES OF AMERICA,
Cross-Appellant,
v.
MIKE H. KOSTELAC and MARYLAND CASUALTY COMPANY, a Corporation,
Cross-Appellees.

PETITION

Of Defendants-Appellants to Modify Opinion or for a Rehearing.

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St. Louis Law Printing Co., 415 North Eighth Street. CEntral 1-4477.

FILED

No. 15,343.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

MIKE H. KOSTELAC and MARYLAND CASUALTY COMPANY, a Corporation,
Appellants,
v.
UNITED STATES OF AMERICA,
Appellee.

UNITED STATES OF AMERICA,
Cross-Appellant,
v.
MIKE H. KOSTELAC and MARYLAND CASUALTY COMPANY, a Corporation,
Cross-Appellees.

PETITION

Of Defendants-Appellants to Modify Opinion or for a Rehearing.

Come now Mike H. Kostelac and Maryland Casualty Company, Defendants-Appellants herein, and move the Court to modify its opinion filed herein on June 28, 1957, as follows: By deleting the requirement in the opinion that this case be "remanded to the District Court to find the reasonable value of the food collected by Kostelac and render judgment to the United States therefor", or by modifying such language as requested hereinafter; or, in the alternative, for a rehearing on such portion of the opinion.

As ground for this motion, Defendants-Appellants state that upon the rescission of this contract, as decreed by this Court in said opinion, any right, if any, in plaintiff to recover for the reasonable value of any goods delivered is

based upon the law of quasi contract, and the legal rules concerning quantum meruit or quantum valebat; that under the facts and undisputed evidence in the record of this case, such recovery, if any, would be limited to the value of the benefit to defendant Kostelac of the goods received by him under the voidable contract, and the evidence in this case conclusively shows that such goods were of no value or benefit to said defendant.

As further ground, Movants state that Plaintiff-Appellee in this action has elected to stand or fall upon recovery under the written contract; that Plaintiff has failed to request recovery on the basis of quantum valebat in its pleadings; that Plaintiff has excluded quantum valebat as an issue in the complete Pre-Trial Stipulation of the parties herein, and has expressly limited itself to recovery under the voidable contract in the trial of this cause, and upon the appeal of this cause.

In the event this Court should not delete the above provision in the opinion for remanding this cause, Defendants-Appellants move this Court to modify said language by directing the District Court to proceed with the further hearing of this cause on the basis of quasi-contract recovery or quantum valebat, based upon a requirement that plaintiff's recovery be limited to the amount, if any, of the direct pecuniary advantage to defendant Kostelac from his receipt of said food.

In the alternative, Defendants-Appellants move the Court for a rehearing on the above question of recovery by the Plaintiff-Appellee.

EISENHOWER, HUNTER, RAMSDELL & DUNCAN,
TENNEY, DAHMAN & SMITH,
Attorneys for Defendants-Appellants, Mike H. Kostelac and Maryland Casualty Company, a Corporation.

MEMORANDUM IN SUPPORT OF PETITION TO MODIFY OPINION.

At the end of the opinion filed herein on June 28, 1957, this Court has remanded this cause to the District Court to "find the reasonable value of the food collected by Kostelac and render judgment to the United States therefor."

The question of quantum meruit or quantum valebat recovery by the Government in this action had not been briefed or raised on this appeal, and it was not relevant to the principal issues involved. In the interest of avoiding future conflicts, or possible future appeals in the conflict which is over eleven years old and has caused untold loss to Defendant Kostelac, we respectfully suggest the following, which relates solely to the single matter of quasi-contractual recovery.

Under the peculiar facts of this case, as distinguished perhaps from the majority of cases involving quasi-contractual recovery, the government's recovery on quantum valebat herein, under the decisions, would not be determined solely by testimony concerning the price that would be paid by a willing buyer to a willing seller for the food picked up by defendant Kostelac between July 1, 1946, and December 15, 1946.

The application of a different rule in this case results from the fact that here defendant Kostelac, probably with no blame on his part, suffered a financial loss from collecting the food, so that there was lacking the usual element of "benefit to the recipient." We refer briefly to the facts in evidence on this appeal, before citing authorities.

When defendant Kostelac discovered a mistake in his contract, immediately after he commenced performance on July 1, 1946, he was directed by the contracting officer to continue to haul the garbage while an effort was being made to correct the mistake in the contract (Tr. 140).

Defendant Kostelac did as requested, and hauled the garbage for the first three weeks to his Gig Harbor farm preparatory to setting up a new farm at Roy, Washington, near Fort Lewis, and he paid the expensive double ferry tolls on each trip, carrying the garbage an impractical distance in the interim (Tr. 161). Defendant Kostelac had told the government that he was setting up his farm at Roy, Washington, making the express statement on the last page of his bid (Exhibit 1 in this case).

After defendant Kostelac was ready to set up his Roy, Washington, farm after approximately three weeks performance under the contract, the testimony shows that he held up setting up the new farm, because of the dispute over the mistake in his contract (Tr. 173). As the direct result of the government's request that he continue to carry off the garbage, and as the direct result of the delay involved in the government's consideration and ultimate rejection of Mr. Kostelac's proper request to correct the obvious mistake, while the matter was being considered in San Francisco and Washington *Mr. Kostelac dumped all the garbage at a complete loss during the entire five month period to December 15, 1946* (Tr. 158, 173).

There is no question from the undisputed evidence in the Record that the very slight benefit, if any, derived by Kostelac for the first *three weeks* of the contract, when he hauled the garbage a long distance over expensive ferries, was more than offset by *five months* of continual dumping of the garbage thereafter at a complete loss to defendant Kostelac for all labor and equipment costs in this very large operation. During all this period the government delayed, and finally refused to correct the obvious mistake in Kostelac's contract of which it had full knowledge (Tr. 98-106, esp. 104) but which information was withheld from defendant Kostelac (Tr. 138).

The applicable law is collated in the *Restatement of Restitution*, Section 155, p. 611, as follows:

"Non-Tortious Recipient Not More at Fault Than Claimant.

"(1) Where a person is entitled to restitution from another because the other, without tortious conduct, has received a benefit, the measure of recovery for the benefit thus received is the value of what was received, *limited, if the recipient was not at fault or was no more at fault than the claimant, to ITS VALUE IN ADVANCING THE PURPOSES OF THE RECIPIENT,* except . . ."

Comment (p. 612):

"a. . . . The rule applies where property has been transferred. . . . as the result of a transaction between the claimant and the person benefited, which transaction has been *rescinded because of mistake* . . ."

"b. *Advancing the purpose of the recipient.* This phrase has reference to the fact that *the value of what is given may not be the same as the value of the benefit received by the recipient considering his purposes.*" (Emphasis supplied.)

At the beginning of the *Restatement of Restitution,* sec. 1, e, the following rule is also set forth:

"*Where benefit and loss do not coincide.* There are situations, however, in which a remedy is given under the rules applicable to this subject, where the benefit received by the one is less than the amount of the loss which the other has suffered. In such case, if the transferee was guilty of no fraud, the amount of recovery is usually limited to the amount by which he has been benefited."

The rule is also explained in *Williston on Contracts,* Revised Edition, Vol. 5, sec. 1575, pp. 4404-4406, where the identical question as to amount of recovery in case of mistakes in contracts was considered as follows:

"*Recovery of the value of goods delivered or services rendered under a mistake.* . . . It may be supposed, however, that goods or other property have been transferred, and that neither they nor traceable products of them are in existence, but that, nevertheless, a pecuniary benefit has been received from their use. It may be argued with great force that on principles of quasi contract, recovery of the value of this benefit should be permitted; but it may be replied that to allow such recovery is, in effect, to force a bargain upon an innocent defendant for what he may not have desired to buy on such terms (citing cases). In spite of the latter argument it seems the lesser evil, if the plaintiff has been guilty of no negligence, to allow recovery of the value of the benefit received *TO THE EXTENT THAT THE PROPERTY HAS BEEN OF DIRECT PECUNIARY ADVANTAGE TO THE RECIPIENT*" (citing cases). (Last emphasis supplied.)

The same rule is given in *Corbin on Contracts,* Volume 3, Section 599 "Mistake", pp. 363-4:

"For performance in such a case (of mistake), recovery must be quasi-contractual in character, generally based upon the *value of the benefits actually received by the other party.*" (Emphasis supplied.)

The decisions by the Federal courts follow the above rules of law as to quasi-contractual recovery:

Pittsburgh, C. etc., Ry. Co. v. Keokuk and Hamilton Bridge Co. (U. S. Supreme Court, 1889), 131 U. S. 371, l. c. 389, 9 Sup. Ct. 770;

Morton v. Roanoke City Mills, Inc. (C. A. 4, 1926), 15 Fed. (2d) 545, l. c. 547;

Andrew Bros. Co. v. Youngstown Coke Co. (C. A. 6, 1898), 86 Fed. 585, l. c. 596-7;

In re Irving-Austin Bldg. Corp. (C. A. 7, 1939), 100 Fed. (2d) 574, l. c. 578.

In the Pittsburgh, C. etc., Ry. Co. case, supra, the Supreme Court stated that (l. c. 389):

> ". . . according to many recent opinions of this Court . . . the proper remedy of the party aggrieved (because a contract is ultra vires) is by disaffirming the contract, and suing to recover, as on a *quantum meruit,* the value of *what the defendant has actually received the benefit of.*" (Citing five other U. S. Supreme Court decisions.) (Emphasis supplied.)

In the case of *Morton v. Roanoke,* supra, the Court went so far as to instruct the jury (l. c. 547) that "*his (plaintiff's) profit or loss was not relevant to the inquiry. The benefit to the defendant was the proper test.*" (Citing treatises by Williston and Woodward.) (Emphasis supplied.)

We feel strongly that the reason for the above rule of law is well demonstrated in the present case. Mr. Kostelac had contracted for a five-year contract with operations at his farm at nearby Roy, Washington, which he was ready to set up (as stated in his bid). He had no desire for a contract on any other basis, and it was only by force of circumstances that he obligingly removed the garbage for the Government and dumped it at a loss pending settlement of the dispute.

A further basis for excluding quantum meruit recovery in the present case is that the Government has never requested it. We believe that it was because of the above-cited rule limiting quantum valebat recovery to the amount of the benefits, that there has never been a suggestion of a request or alternative request for such recovery in any of the pleadings, the pre-trial stipulation, the trial of the cause, or on this appeal. More than that, the government has specifically limited the issues in the Pre-Trial Order (Tr. pp. 67-68); and upon the trial of this case the government caused evidence to be excluded which would

further bear on the subject of quantum valebat. We refer to pages 141-142 of the printed transcript herein, in which we specifically raised the question of "whether there is an effort here to hold Mr. Kostelac on Quantum Meruit or Quantum Valebat." Upon the government's objection, the Court excluded evidence on this matter, and stated (Tr. 142):

> "As I read the pre-trial order, they (the government) were relying solely on this contract. At least, that is the way I read the pre-trial order. Until I see something more about it, I will sustain the objection."

We, therefore, contend that on the basis of the pleadings, the Pre-Trial Order, the statements at the trial of this cause, and the theory of this appeal, this Court would be justified in concluding that there is no issue of quantum valebat in the action.

Even if quantum valebat were not thus excluded from the case because of the pleadings, stipulation, etc., we submit that the undisputed evidence, as set out above, patently shows that Mr. Kostelac did not derive one cent of advantage from the pickup of the food, and because of this undisputed evidence in the record on this appeal, there is nothing in the record that requires a further hearing in the District Court.

In the event, however, that the Court feels that the matter should be heard further in the District Court, we respectfully request that the language in the opinion be slightly modified. Although this Court in its opinion doubtlessly intended that future hearings in the District Court should be in accordance with the law of Quasi Contract, still the words, "find the reasonable value of the food collected by Kostelac and render judgment to the United States therefor," might be argued to mean that the District Court is not to consider the question of whether Kostelac actually received a benefit. We suggest

that it would prevent future conflict in further hearings of this cause, and possibly further appeals if there might be added to the opinion the requirement that the District Court hear evidence on the question of quasi contractual recovery under the law relating thereto. If the Court desires to do so, we believe it would clarify the matter further to state that the recovery, if any, on such future hearing shall be limited to the amount of benefit, if any, to Kostelac as the result of his pick-up of the food.

In the alternative, defendants-appellants move for a rehearing of the above matter.

Respectfully submitted,

EISENHOWER, HUNTER, RAMSDELL & DUNCAN,
TENNEY, DAHMAN & SMITH,
Attorneys for Defendants-Appellants,
Mike H. Kostelac and Maryland
Casualty Company, a Corporation.

State of Missouri }
City of St. Louis } ss.

E. H. Tenney, Jr., being duly sworn on his oath, states that he is one of counsel for defendants-appellants herein, and certifies that in his judgment the foregoing Petition to Modify Opinion or for a Rehearing is well founded and that it is not interposed for delay.

s/ E. H. Tenney, Jr.

Subscribed and sworn to before me this 17th day of July, 1957.

s/ Marie Eaton,
Notary Public.

My commission expires April 8, 1959.

No. 15344

United States
Court of Appeals
for the Ninth Circuit

TSEUNG CHU, Also Known as BOW QUONG CHEW, Also Known as TSEUNG BOW-QUONG CHEW, Also Known as THOMAS BOWQUONG CHEW,

Appellant,

vs.

GORDON L. CORNELL, Acting Officer in Charge of United States Department of Justice, Immigration and Naturalization Service, of Los Angeles, California,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

FILED
JAN 18 1957
PAUL P. O'BRIEN, CL

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-18-57

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States in and for the Southern District of California, Central Division

No. 18970-WM

TSEUNG CHU, Also Known as BOW QUONG CHEW; Also Known as TSEUNG BOW-QUONG CHEW, Also Known as THOMAS BOWQUONG CHEW,

Plaintiff,

vs.

GORDON L. CORNELL, Acting Officer in Charge of United States Department of Justice Immigration and Naturalization Service at Los Angeles, California,

Defendant.

COMPLAINT FOR REVIEW OF DEPORTATION ORDER AND FOR DECLARATORY RELIEF AND TO DECLARE DEPORTATION ORDER VOID, AND FOR INJUNCTION RESTRAINING EXECUTION AND ENFORCEMENT OF DEPORTATION ORDER

I.

This is an action of a civil nature brought to review an order dated and filed December 7, 1954, made by H. R. Landon as District Director of Immigration and Naturalization for the District of Los Angeles, California, and the order of John B. Bartos, Special Inquiry Officer, dated December 7, 1954, incorporated in the said order of said District

Director, denying the application of plaintiff herein to terminate the deportation proceedings against plaintiff pending under the Immigration and Nationality Act of 1952 and ordering that plaintiff be deported from the United States on the charges contained in the warrant of arrest in such deportation proceedings, the said order of said District Director being based on the decision of said Special Inquiry Officer dated December 7, 1954, which latter decision [2*] ordered the deportation of plaintiff and denied plaintiff's motion to terminate such deportation proceedings; and this action is one brought also for declaratory relief and for an order of this Court declaring such order of said District Director of Immigration and Naturalization void, and for an injunction restraining the execution of said order of deportation by defendant as acting officer in charge of the United States Department of Justice Immigration and Naturalization Service at Los Angeles, California.

This action arises under and involves the interpretation of the following Acts of Congress:

> Sections 10 and 12 of the Administrative Procedure Act of 1950 (Title 5, USCA, Sections 1009 and 1011, respectively; 60 Stat. 244); Sections 241(a)(1) of the Immigration and Nationality Act of 1952 (66 Stat., Title 8, USCA, Section 1251(a)(1)); and Sections 212 (a)(9) and 212(a)(19) of the Immigration and Nationality Act of 1952 (66 Stat. 182, Title 8,

*Page numbering appearing at foot of page of original Certified Transcript of Record.

USCA, Sections 1182(a)(9) and 1182(a)(19), respectively); and Title 26, USCA, Section 145(b).

Jurisdiction is conferred on this Court by Title 28, USCA, Section 1346, and Title 5, USCA, Section 1109, and Title 28, USCA, Sec. 1651.

III.

That plaintiff is a resident alien of the United States of America who last entered the United States on August 11, 1953, at which time he was admitted into the United States as a returning resident alien; that plaintiff first entered the United States on or about November 9, 1907, and thereafter departed from the United States; that he was readmitted into the United States on or about October 22, 1913, as a treaty merchant under and in accordance with the Treaty of Trade and Commerce between the United States and China.

IV.

That defendant is Acting Officer in Charge of the United States Department of Justice Immigration and Naturalization Service at Los Angeles, [3] California.

V.

That on or about the 28th day of April, 1954, plaintiff was served with a warrant of arrest issued by H. R. Landon, District Director for the United States Department of Justice Immigration and Naturalization Service at Los Angeles, California; that a true and correct copy of said warrant of

arrest is hereto attached, marked "Exhibit A" and by reference made a part hereof with the same force and effect as if said warrant were herein fully set forth; that after the service of said warrant of arrest plaintiff was admitted to bail pending determination of deportability under bond in the amount of $1,000.00; that on or about the 30th day of April, 1954, plaintiff was served with notice of hearing to enable him to show cause why he should not be deported from the United States in conformity with law; that a true and correct copy of said notice of hearing is hereto attached, marked "Exhibit B" and by reference made a part hereof with the same force and effect as if said notice were herein fully set forth; that said notice was signed by Alfred E. Edgar, Jr., for the District Director of the Department of Justice Immigration and Naturalization Service at Los Angeles, California; that said warrant of arrest and said notice of hearing were in File No. A2534235 IB in said Immigration and Naturalization Service files and records.

VI.

That thereafter and on or about the 11th day of May, 1954, a hearing was had before John B. Bartos, Special Inquiry Officer of the Department of Justice Immigration and Naturalization Service at Los Angeles, California, pursuant to the said notice of hearing; and that thereafter and on or about the 25th day of May, 1954, the said Special Inquiry Officer made his order ordering that plaintiff be deported from the United States in the man-

ner provided by law on the charges contained in said warrant of arrest and that the motion of plaintiff to terminate such deportation proceedings be and the same was denied; that thereafter plaintiff made a motion to reopen such deportation [4] proceedings before the said Special Inquiry Officer, and on June 30, 1955, said Special Inquiry Officer ordered that said deportation hearing be reopened; that such reopened proceeding came on for hearing on November 16, 1954, and that thereafter and on or about the 7th day of December, 1954, said Special Inquiry Officer again made an order ordering that plaintiff be deported from the United States in the manner provided by law on the charges contained in the warrant of arrest and that the motion of plaintiff to terminate the proceedings be and the same was denied. That thereupon the said District Director of Immigration and Naturalization at Los Angeles made and filed his order and decision hereinbefore referred to.

VII.

That on or about the 17th day of December, 1954, plaintiff appealed to the Board of Immigration Appeals from the order and decision in the said deportation proceedings dated December 7, 1954; that on the 4th day of February, 1955, plaintiff's appeal came on for hearing and the same was, after argument, submitted to said Board of Immigration Appeals for decision.

VIII.

That on the 3rd day of October, 1955, the Board of Immigration Appeals gave its decision holding

plaintiff deportable upon the charges stated in the warrant of arrest and ordering that plaintiff's appeal from the order of the said Special Inquiry Officer be and the same was dismissed.

IX.

That plaintiff is a resident of the City of Los Angeles and the Southern Judicial District of the State of California. That defendant's official residence is within the Southern Judicial District of the State of California.

X.

That defendant as Acting Officer in Charge of the United States Department of Justice Immigration and Naturalization Service [5] at Los Angeles, California, is the officer of the United States charged by law with and having the official duty to carry out the enforcement of the said order of deportation against plaintiff if said order be valid and enforceable. That insofar as this action is concerned and insofar as the enforcement of said order of deportation is concerned defendant has succeeded to the powers and duties of said H. R. Landon as District Director of Immigration and Naturalization at Los Angeles, California.

XI.

That defendant, acting in his official capacity, threatens to enforce such order of deportation against plaintiff, and that defendant in his official capacity will, unless enjoined by order of this Court

from so doing, enforce such deportation order against plaintiff, and defendant in his official capacity will, unless enjoined by order of this Court from so doing, deport plaintiff from the United States of America. That defendant will enforce such order of deportation and deport plaintiff, unless defendant be enjoined from so doing, during the pendency of these proceedings; and plaintiff is informed and believes and therefore alleges that defendant will attempt to enforce such order of deportation and deport plaintiff unless defendant be enjoined from so doing by a temporary restraining order issued by this Court pending the hearing of a motion by plaintiff for an injunction pendente lite enjoining and restraining defendant from carrying out such order of deportation.

XII.

That the said order of deportation dated December 7, 1954, was and is void and in error, and was and is arbitrary, capricious, and not in accordance with law, and was and is contrary to constitutional right, and was and is in excess of statutory jurisdiction, authority and limitation, and was and is without observance of procedure required by law, and was and is unsupported by substantial or any evidence, and was and is unwarranted by the facts. That the order and [6] decision of said Special Inquiry Officer dated December 7, 1954, referred to in the said order of deportation was and is void and in error, and was and is arbitrary, capricious, and not in accordance with law, and was and is con-

trary to constitutional right, and was and is in excess of statutory jurisdiction, authority and limitation, and was and is without observance of procedure required by law, and was and is unsupported by substantial or any evidence, and was and is unwarranted by the facts.

XIII.

That the said order of deportation, a copy of which is marked "Exhibit C" and hereto attached and by reference made a part hereof, should be declared void by this Court and defendant should be enjoined from enforcing said order of deportation in that and for the reason that said order is based upon an erroneous finding of fact and an erroneous conclusion of law that plaintiff was at the time of his entry into the United States on August 11, 1953, an alien excludable by law, to wit, an alien who had prior to such entry been convicted of a crime involving moral turpitude, and in that and for the reason that the said order is based on an erroneous finding of fact and an erroneous conclusion of law that plaintiff was at the time of his entry into the United States on August 11, 1953, an alien excludable by law, to wit, an alien who had procured a visa or other documentation by fraud or by wilfully misrepresenting a material fact. That the statute which provides for the deportation of aliens excludable at the time of entry is Title 8, USCA, Section 1251(a)(1); that the statute stating that an alien is excludable if he committed prior to entry a crime involving moral tur-

pitude is Title 8, USCA, Section 1182(a)(9); and that the statute stating that an alien is excludable if he procured a visa or other documentation by fraud or by wilful misrepresentation of a material fact prior to entry is Title 8, USCA, Section 1182 (a)(19).

That plaintiff was not convicted of a crime involving moral turpitude prior to his entry into the United States on August 11, 1953, [7] and that the order of deportation should be declared void and the enforcement thereof should be enjoined in that and for the reason that it is based upon an erroneous finding of fact and an erroneous conclusion of law that the conviction of plaintiff prior to his said entry on August 11, 1953, upon his plea of nolo contendere of the crime of wilful attempt to defeat or evade income tax in violation of Title 26, USCA, Section 145(b), was a conviction of a crime involving moral turpitude and that plaintiff had been prior to his said entry on August 11, 1953, convicted of a crime involving moral turpitude. That in fact plaintiff was on March 27, 1944, convicted in the District Court of the United States in and for the Southern District of California upon his plea of nolo contendere of violation of Title 26, USCA, Section 145(b), but that such conviction was not and is not a conviction of a crime involving moral turpitude within the meaning of the Immigration and Nationality Act of 1952. That there is no legal evidence to support the finding and/or conclusion that plaintiff was convicted of a crime in-

volving moral turpitude prior to his said entry on August 11, 1953.

That said order of deportation dated December 7, 1954, is against the law in that the phrase or ground "crime involving moral turpitude" as found in the Immigration and Nationality Act of 1952, insofar as it applies to the crime of wilful attempt to defeat or evade income tax (Title 26, USCA, Section 145(b)) has no sufficiently definite meaning to be a constitutional standard for deportation.

That plaintiff did not procure a visa or other documentation for entry into the United States by fraud or wilful misrepresentation of a material fact prior to his said entry of August 11, 1953, and that the order of deportation should be declared void and the enforcement thereof should be enjoined in that and for the reason that it is based upon an erroneous finding of fact and an erroneous conclusion of law that plaintiff procured a visa for his said entry on August 11, 1953, by fraud and by a wilful misrepresentation of a material fact, [8] and in that said order of deportation is based upon an erroneous finding of fact and an erroneous conclusion of law that the failure of plaintiff to mention in his application for a visa his said conviction of March 27, 1944, was fraud and a wilful misrepresentation of a material fact. Plaintiff alleges that in fact he did not mention said conviction in his application for a visa, but plaintiff further alleges that his failure to mention said conviction was not fraud and was not a wilful misrepre-

sentation of a material fact in that said conviction not being a conviction of a crime involving moral turpitude was not a material fact upon plaintiff's application for a visa, and plaintiff further alleges that inasmuch as said conviction was upon a plea of nolo contendere plaintiff was not required in any event to admit said conviction in his application for a visa; and plaintiff further alleges that his failure to mention said conviction in his said application was in fact unintentional and inadvertent and was not wilfully done; and plaintiff alleges that he did not procure his visa or any other documentation by fraud or by wilful misrepresentation of a material fact; and plaintiff alleges that there is no legal evidence that plaintiff procured a visa or other documentation by fraud or by wilful misrepresentation of a material fact.

XIV.

That said order of deportation of plaintiff was and is against the law and was and is a denial of a fair hearing to plaintiff and an abuse of discretion by the said District Director of Immigration and Naturalization at Los Angeles, California.

That the order and decision of the Special Inquiry Officer dated December 7, 1954, referred to in said order of deportation was and is against the law and was and is a denial of a fair hearing to plaintiff and an abuse of discretion by the said Special Inquiry Officer; that plaintiff is not deportable under the Immigration and Nationality Act of 1952. [9]

XV.

That plaintiff has exhausted his administrative remedies.

XVI.

That plaintiff's rights are and will be in danger unless this Court enjoins defendant from the enforcement of said order of deportation and that plaintiff has no adequate remedy at law. That an injunction herein enjoining and restraining defendant from enforcing said order of deportation pendente lite and permanently should issue and that a restraining order should issue herein enjoining and restraining defendant from enforcing said order of deportation pending the hearing of an application by plaintiff for an injunction pendente lite.

Wherefore, plaintiff prays judgment as follows:

1. That the Court review the said order of deportation hereinbefore mentioned and declare the rights and legal relations of plaintiff and defendant under and by reason of the said order of deportation, and that the Court declare and hold said order of deportation and the order and decision of the Special Inquiry Officer hereinbefore referred to dated December 7, 1954, and each of them, void and of no force and effect;

2. That defendant be enjoined during the pendency of this action and permanently from enforcing and attempting to enforce the said order of deportation dated December 7, 1954, and the said order of said Special Inquiry Officer dated Decem-

ber 7, 1954, referred to in said order of deportation, and from deporting or attempting to deport plaintiff from the United States of America;

3. That pending the hearing of an application by plaintiff for an injunction pendente lite herein defendant be enjoined and restrained from enforcing or attempting to enforce said order of deportation and said order and decision of said Special Inquiry Officer and from deporting or attempting to deport plaintiff from the United States of America.

/s/ FRANCIS C. WHELAN,
Attorney for Plaintiff.

Duly verified. [10]

EXHIBIT A

Warrant

For Arrest of Alien

United States of America
Department of Justice
Immigration and Naturalization Service

No. A 2 534 235

To any officer in the service of the United States Immigration and Naturalization Service:

Whereas, from evidence submitted to me, it appears that the alien, Thomas Bowquong Chew, aka

Tseung Bowquong Chew, aka Chew Bow Quong, aka Chu Tseung, who entered this country at Honolulu, Hawaii, on the 11th day of August, 1953, has been found in the United States in violation of the immigration laws thereof, and is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to wit:

> Sec. 241(a)(1) of the Immigration and Nationality Act, in that at time of entry he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, aliens who have been convicted of a crime involving moral turpitude, under Sec. 212(a)(9) of the Act, to wit: Making false and fraudulent income tax returns, in violation of Title 26, United States Code, Sec. 145(b).
>
> Sec. 241(a)(1) of the Immigration and Nationality Act, in that, at time of entry he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, aliens who have procured a visa, or other documentation, by fraud, or by wilfully misrepresenting a material fact, under Sec. 212(a)(19) of the Act.

I, by virtue of the power and authority vested in me by the laws of the United States, hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with

law. The expenses of detention, hereunder, if necessary, are authorized payable from the appropriation "Salaries and Expenses, Immigration and Naturalization Service, 1954."

The Said Alien May Be Released From Custody Pending Determination of Deportability Under Bond in the Amount of $1,000.00.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 20th day of April, 1954.

H. R. LANDON,
District Director.

w/s [12]

EXHIBIT B

United States Department of Justice
Immigration and Naturalization Service
458 South Spring Street
Los Angeles 13, California

File No. A2 534 235 IB.

Date: April 30, 1954.

Mr. Thomas Bowquong Chew,
4150 So. Figueroa St.,
Los Angeles, California.

Dear Sir:

Pursuant to the warrant of arrest served on April 28, 1954, you are advised to appear in Room 138,

Rowan Building, 458 South Spring Street, Los Angeles, Calif., on Tuesday, May 11, 1954, at 9:00 a.m., for a hearing to enable you to show cause why you should not be deported from the United States in conformity with law.

You are charged with being an alien illegally in the United States and subject to deportation upon the following grounds:

Sec. 241(a)(1) of the Immigration and Nationality Act, in that, at time of entry you were within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, aliens who have been convicted of a crime involving moral turpitude, under Sec. 212(a)(9) of the Act, to wit: Making false and fraudulent income tax returns, in violation of Title 26, United States Code, Sec. 145(b).

Sec. 241(a)(1) of the Immigration and Nationality Act, in that, at time of entry, you were within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, aliens who have procured a visa, or other documentation, by fraud, or by wilfully misrepresenting a material fact, under Sec. 212(a)(19) of the Act.

At the hearing you may be represented by an attorney or other person or organization authorized to practice before the Immigration and Naturalization Service. Such representation shall be without expense to the Government. You should bring to

the hearing any documents which you desire to have considered in connection with the case. If any document is in a foreign language you should bring the original and certified translation thereof.

Very truly yours,

ALFRED E. EDGAR, JR.,
For the District Director.

Copy to: Mr. Boyd H. Reynolds (surety),
257 S. Spring St.,
Los Angeles 12, Calif.

Registered Mail. [13]

EXHIBIT C

United States Department of Justice
Immigration and Naturalization Service
458 South Spring Street
Los Angeles 13, California

Please address reply to
District Director
and refer to this
File No. A2 534 235 (IB)

Registered Mail—
Return Receipt Requested

Dec. 7, 1954.

Mr. Francis C. Whelan,
Attorney at Law,
811 West 7th Street,
Los Angeles 17, California.

Dear Sir:

The application of Chu, Tseung, aka Chew, Bow Quong, aka Tseung Bowquong Chew, aka Thomas Bowquong Chew has been denied for the following reasons:

> See attached copy of decision of the Special Inquiry Officer.

This decision is final unless an appeal is taken to the Board of Immigration Appeals in Washington, D. C., and notice of appeal is filed within 10 days (not including Sundays and holidays) after receipt of this notice.

If an appeal is desired, the Notice of Appeal on Form I-290A, copies of which are enclosed, shall be executed in duplicate and filed with this office, together with a fee of twenty-five dollars ($25). Remittances should be made payable to the "Treasurer of the United States." If residing in the Virgin Islands, remittances should be drawn in favor of the "Commissioner of Finance of the Virgin Islands." If residing in Guam, remittances should be drawn in favor of the "Treasurer, Guam." Do not send coins or postage stamps. A postal, express, or bank money order is preferred. A brief or other written statement in support of your appeal may be submitted with the Notice of Appeal. You may request oral argument before the Board of Immigration Appeals.

Any question which you may have will be answered by the local immigration office nearest your

residence, or at the address shown in the heading of this letter.

Sincerely yours,

H. R. LANDON,
District Director.

Enclosures. [14]

United States Department of Justice
Immigration and Naturalization Service

Dec. 7, 1954.

File No. A2 534 235—Los Angeles.

In Re: Chu, Tseung, a/k/a Chew, Bow Quong, a/k/a Tseung Bowquong Chew, a/k/a Thomas Bowquong Chew.

In Deportation Proceedings

In Behalf of Respondent:
Mr. Francis C. Whelan,
Attorney at Law,
811 West 7th Street,
Los Angeles 17, California.

Charges:

Warrant:

I & N Act—Excludable at time of entry—convicted of crime involving moral turpitude.

I & N Act—Excludable at time of entry—visa procured by fraud or wilfully misrepresenting a material fact.

Lodged: None.

Application: Terminate proceedings.

Detention Status: Released under $1,000.00 bond.

Warrant of Arrest Served: April 28, 1954.

Discussion: The respondent is a 65-year-old married male, a native and citizen of China, who last entered the United States at Honolulu, T. H., on August 11, 1953, and at that time was admitted into the United States as a returning resident alien.

This respondent was accorded a full hearing under the warrant of arrest at Los Angeles, California, on May 11, 1954. On the basis of that hearing a decision was entered by the Special Inquiry Officer on May 25, 1954, ordering the respondent deported from the United States, and in that decision the factors of the case were thoroughly discussed and that discussion is adopted as a part of this decision.

The decision of May 25, 1954, was appropriately served and on June 7, 1954, an appeal was received at the Los Angeles office, dated June 4, 1954, from the above-cited decision. However, prior to the forwarding of the record on appeal, Counsel for the respondent on June 25, 1954, submitted a motion to reopen the proceedings for the purpose of introduring into the record new evidence pertinent to the proceedings. Under date of June 30, 1954, the motion was granted and the hearing ordered reopened, and on November 16, 1954, the reopened hearing was conducted.

At the reopened hearing on November 16, 1954, there was introduced on behalf of the respondent an order of the United States District Court at Los Angeles, California, number 16635-Criminal, correcting a "clerical error" in the judgment entered in the case of this respondent by the United States District Court at Los Angeles, California, on March 27, 1944. [15]

In the judgment entered in the case on March 27, 1944, it was stated:

> "The defendant having been convicted on his plea of nolo contendere of the offenses charged in the indictment in the above-entitled cause, to wit, make false and fraudulent income tax returns as more fully set forth and charged in the counts of the indictment herein. * *"

On June 21, 1954, this part of the judgment was corrected to read:

> "Whereas the defendant having been convicted on his plea of nolo contendere of the offenses charged in the indictment in the above-entitled cause, to wit, wilful attempts to evade and defeat income tax. * *"

The correction in the judgment removes the words—"make false and fraudulent income tax returns,"—as contained in the original judgment, and substituting the words—"wilful attempts to evade and defeat income tax," both judgments referring to the offenses charged in the indictment, and showing that the respondent had been con-

victed on his plea of nolo contendere of those offenses.

It is contended that the corrected judgment removes the element of moral turpitude from the offense for which the respondent was convicted, and raises the further contention that a conviction on a plea of nolo contendere is only sufficient for the purpose of the case and may not be used in any other proceeding.

In the matter of W——, Interim Decision number 587, decided by the Board on May 27, 1954, in an income tax evasion conviction case concerning the plea of nolo contendere it was stated:

> "It is noted in passing that respondent was convicted of violating 28 U.S.C. 145(b) on a plea of nolo contendere. Under the Federal Criminal Procedure rule 11, the right to such a plea is clearly discretionary with the court. A plea of nolo contendere is an admission of guilt or in effect a plea of guilty, but only for the purposes of the case. Such a plea leaves open for review solely the question of the sufficiency of the indictment. Since respondent entered this plea on advice of counsel and with the consent of the court and because this plea is equivalent to an admission of guilt, the plea is definitely final and completely binding upon respondent."

Section 212(a) (9) provides:

> "Except as otherwise provided in this Act, the following classes of aliens shall be ex-

> cluded from admission into the United States: —aliens who have been convicted of a crime involving moral turpitude (other than a purely political offense), or aliens who admit having committed such a crime, * * *''

This statute does not prescribe the manner in which the alien must be convicted of the crime, and he is excludable from admission to the United States whether convicted upon his plea of guilty, plea of nolo contendere, or after a plea of not guilty, either by jury or by the court. Therefore, a conviction on a plea of nolo contendere is a conviction on which deportation proceedings may be based, if the crime involves moral turpitude and is pertinent to the proceedings.

Going again to the indictment on which this respondent was convicted on his plea of nolo contendere on March 27, 1944, for violation of Title 26 United States Code, Section 145(b), it is noted that in each count of the indictment the respondent is charged with as means of so wilfully, knowingly, unlawfully and feloniously attempting to evade and defeat said tax, did make under his oath to said Collector of Internal Revenue a false and fraudulent income tax return. The order correcting the judgment of March 27, 1944, corrects the judgment to read that the defendant was convicted of the offenses charged in the indictment, willful attempts to evade and defeat income tax. He was sentenced to pay a fine of $1,000.00 on each of the four counts of the indictment for a total fine of $4,000.00.

In Interim Decision number 587 it was stated:

> "The moral turpitude question then turns on the crucial statutory word 'willfully.' According to Hargrove vs. United States, 67 F. (2d) 820 (C.C.A. 5, 1933), 'willful' in Section 145 (b) means actual knowledge of the existence of the obligation and specific wrongful intent."

The Interim Decision 587 goes on to state:

> "We feel that the courts in passing on Section 145 (b), as well as in other cases like Morissette vs. United States, have determined 'willfully' connotes an evil intent, since it differentiates between conscious or deliberate acts and accidental or unintentional infractions. In addition, Section 145 (b) imposes a duty on the taxpayer to pay the amount he justly owes and failure to do so, through a willful attempt to evade, constitutes unjust enrichment of the taxpayer and an intent to deprive the Government of this tax money."
>
> "Hence, since moral turpitude inheres in the intent the offense defined in 26 U.S.C. 145 (b) is a crime involving moral turpitude."

The corrected judgment in the case making the judgment read that the respondent having been convicted of the offenses charged in the indictment, namely, willful attempts to evade and defeat the income tax, and the offenses in the indictment having been described as making false and fraud-

ulent income tax returns willfully, knowingly, unlawfully and feloniously, it must be found that the respondent was convicted of a crime involving moral turpitude on March 27, 1944, and that he is amenable to deportation under the Immigration and Nationality Act on the first charge contained in the warrant of arrest.

In view of the foregoing, no further discussion regarding the second charge in the warrant of arrest is necessary than that contained in the order of May 25, 1954, and accordingly the respondent is found amenable to deportation under the Immigration and Nationality Act on the second charge contained in the warrant of arrest.

Accordingly, the findings of fact and conclusions of law stated in the decision of May 25, 1954, are adopted as part of this decision and the following order will be entered.

Order: It is ordered that the alien be deported from the United States in the manner provided by law on the charges contained in the warrant of arrest.

It Is Further Ordered that the motion to terminate the proceedings be and the same is hereby denied.

JOHN B. BARTOS,
Special Inquiry Officer.

[Endorsed]: Filed November 4, 1955. [17]

[Title of District Court and Cause.]

ORDER OF TRANSFER PURSUANT TO "LOW-NUMBER" RULE

In compliance with the amended order of the Judges, filed April 23, 1953, as to "Transfer of cases involving like issues of fact or law," the above-numbered cause is hereby transferred to the calendar of Judge Wm. M. Byrne for further proceedings.

————————,19——.

/s/ LEON R. YANKWICH,
Chief United States District Judge.

I consent to the foregoing transfer.

November 12, 1955.

/s/ WM. C. MATHES,
United States District Judge.

I accept the foregoing transfer.

Nov. 14, 1955.

/s/ WM. M. BYRNE,
United States District Judge.

(Reason for transfer: "Low-numbered" Case No.————).

(Another immigration case for review of deportation order, injunction, restraining deportation proceedings.)

[Endorsed]: Filed November 15, 1955. [18]

[Title of District Court and Cause.]

AFFIDAVIT FOR ORDER PERMITTING AMENDMENT OF COMPLAINT

State of California,
County of Los Angeles—ss.

Helen Nesbitt, being first duly sworn, deposes and says:

That she is secretary for Francis C. Whelan, attorney for plaintiff herein; that in typing the complaint of plaintiff in the above-entitled action she, through mistake, typed the name of the defendant as Gordon L. Connell, rather than Gordon L. Cornell; that affiant has checked with the office of the United States Department of Justice Immigration and Nauralization Service at Los Angeles, California, and has ascertained from an employee of such service who answered affiant's telephonic inquiry, that Gordon L. Cornell was in fact the Acting Officer in Charge of such service at Los Angeles [19] on the date of the filing of the complaint herein.

/s/ HELEN NESBITT.

Subscribed and sworn to before me this 18th day of November, 1955.

[Seal] /s/ FRANCIS C. WHELAN,
Notary Public in and for Said County and State.

[Endorsed]: Filed November 21, 1955. [20]

[Title of District Court and Cause.]

ORDER PERMITTING AMENDMENT OF COMPLAINT

This matter coming on for hearing upon the application of plaintiff, appearing by and through his attorney of record, Francis C. Whelan, for an order permitting the amendment of his complaint to show that the true name of the defendant sued herein is Gordon L. Cornell, and for an order permitting said complaint to be physically corrected by changing the word "Connell" in the caption thereof to read "Cornell"; and it appearing that through inadvertence and mistake a typographical error was made in setting forth the name of said defendant in the caption of said complaint, and that Gordon L. Cornell rather than Gordon L. Connell is in fact Acting Officer in Charge of the United States Department of Justice Immigration and Naturaliation Service at Los Angeles, California; and it further appearing that summons has not been served herein and that the [21] defendant has not answered or otherwise appeared herein, and good cause appearing therefor,

It Is Ordered that plaintiff's complaint may be amended to show in the caption thereof that the name of the defendant is Gordon L. Cornell and the Clerk is hereby ordered to physically correct the caption of said complaint to show the name of said defendant as Gordon L. Cornell rather than Gordon L. Connell.

Dated this 18th day of November, 1955.

/s/ WM. M. BYRNE,
United States District Judge.

[Endorsed]: Filed November 21, 1955. [22]

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

The defendant above named, by and through the undersigned, in answer to the Complaint on file herein, admits, denies and alleges as follows:

I.

Admits that this action is brought for the purposes described in the first sub-paragraph of Paragraph I, but denies that the action taken by H. R. Landon as District Director of Immigration and Naturalization for the District of Los Angeles, California, on December 7, 1954, constituted an order. Defendant alleges instead that on December 7, 1954, said H. R. Landon, addressed a letter to the attorney representing the plaintiff herein, which letter enclosed and referred to an Order entered by the Special Inquiry Officer. [23]

Neither admits nor denies the allegations contained in the second and third sub-paragraphs of Paragraph I on the ground that said allegations are conclusions of law.

II.

Admits the allegations contained in Paragraphs III, IV, V, VII, VIII, IX, X, and XV.

III.

Admits the allegations contained in Paragraphs VI, except that defendant denies that the District Director of Immigration and Naturalization at Los Angeles made and filed his Order and Decision as alleged in the last sentence of said Paragraph.

IV.

Denies each and every allegation contained in Paragraph XI. Defendant further alleges that at the time the Complaint herein was filed it was the intention of defendant to effect the deportation of plaintiff. However, defendant will take no action to deport plaintiff from the United States of America until the within judicial proceedings are terminated.

V.

Denies each and every allegation contained in Paragraphs XII, XIII, XIV, and XVI.

For a Further, Separate, and First Affirmative Defense to Said Complaint, Defendant Alleges:

I.

The plaintiff has been accorded a full and fair hearing in conformity with law to determine his right to be and remain in the United States. There will be offered in evidence when this matter comes on for hearing a certified record of the Immigration

and Naturalization Service, Department of Justice, relating to the Plaintiff herein, containing the complete record of the deportation proceedings before the Immigration and Naturalization Service. [24]

For a Further, Separate, and Second Affirmative Defense to Said Petition, Defendant Alleges:

I.

The Complaint on file herein fails to state a claim upon which relief can be granted.

Wherefore, defendant prays for a judgment dismissing said Complaint, denying the relief prayed for therein, and for such other relief as to the Court seems just and proper in the premises.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ JAMES R. DOOLEY,
Assistant U. S. Attorney,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 9, 1955. [25]

[Title of District Court and Cause.]

MINUTES OF THE COURT
Dec. 21, 1955.

Present: Hon. Wm. M. Byrne, District Judge.
Counsel for Plaintiff: No Appearance.
Counsel for Defendant: No Appearance.

Proceedings:

It Is Ordered that cause be placed on the calendar of Jan. 23, 1956, 9:45 a.m., for pretrial and setting for trial.

Counsel notified.

JOHN A. CHILDRESS,
Clerk. [27]

[Title of District Court and Cause.]

ORDER

For Pretrial Hearing: Directing Conference By Counsel: Directing Parties to File Pretrial Memoranda, and Directing Plaintiff to File Pretrial Order

It Is Ordered: That a Pretrial Hearing be had in the above-entitled matter on Monday, January 23, 1956, at the hour of 9:45 a.m., in Courtroom No. 4, before Wm. M. Byrne, Judge, at which hearing the following matters will be considered:

1. The simplification and determination of the issues of law and fact, including a consideration of the authorities relied upon.

2. The necessity or desirability of amending the pleadings.

3. The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof. So far as practicable, all documents which either side expects to offer in evidence shall be produced for examination at this hearing.

4. Such other matters as may aid in the disposition of the cause.

It Is Further Ordered: That at the earliest convenient date, not later than ten (10) days, prior to said hearing, counsel for the parties meet and confer in order to ascertain what matters may be covered by stipulation, what documents each party proposes to offer in evidence, what may be done to clarify the issues and shorten the actual trial time, and agree upon the contents of the Pretrial Order referred to below.

It Is Further Ordered: That not later than six (6) days prior to said hearing, counsel for each party shall serve upon opposing counsel and file in the Clerk's Office (in duplicate), a memorandum containing a brief statement of facts (story form), a summary of the points of law involved, citing the supporting authorities, and a list of all exhibits to be offered at time of trial. Do not wait for opposing counsel to file memorandum before filing yours.

It Is Further Ordered: That counsel for Plaintiff, after conference with counsel for the Defendant, shall prepare a proposed Pretrial Order (See

Rule 16, F. R. C. P), reciting the agreements reached, and the issues for trial not disposed of by admissions or agreements of counsel. Counsel for the Plaintiff shall obtain signature of approval of counsel for the Defendant, and submit the proposed Order to the Court (in duplicate) at the Pretrial Hearing.

Upon conclusion of the Pretrial Hearing, the Court will sign the Pretrial Order as proposed, or as modified, and set the cause for trial.

WM. M. BYRNE,
United States District Judge.

Note: For the convenience of counsel, the Court has appended forms of Memoranda and Pretrial Order. It is imperative that counsel comply with the time requirements pertaining to conference and filing of documents. If additional time is required to comply with this Order, submit a timely Stipulation signed by all counsel, setting forth the reasons and requesting a continuance to a stated date (a Monday, at 9:45 a.m.).

Copies mailed December 21, 1955. [28]

[Title of District Court and Cause.]

MINUTES OF THE COURT

January 23, 1956

Calendar: Hon. Wm. M. Byrne, District Judge.

Proceedings:

On the Court's own motion, It Is Ordered that the following causes now coming on for pretrial and setting are continued to Jan. 30, 1956, 10 a.m., for the said proceedings:

* * *

18,970-WB Civil—Tseung Chu, etc. vs. Gordon L. Cornell, etc.
Francis C. Whelan for plf.; James R. Dooley, Asst. U. S. Att'y, for def't.

JOHN A CHILDRESS,
Clerk. [29]

[Title of District Court and Cause.]

MINUTES OF THE COURT

January 30, 1956

Calendar: Hon. Wm. M. Byrne, District Judge.

Counsel: No Appearances.

Proceedings:

It Is Ordered that the following cases now coming

on for pretrial and setting for trial are Continued to Feb. 6, 1956, 10 a.m., for the said proceedings.

* * *

18,970-WB Civil—Tseung Chu, etc. vs. Gordon L. Cornell, etc.

JOHN A. CHILDRESS,
Clerk. [30]

[Title of District Court and Cause.]

MINUTES OF THE COURT

February 6, 1956

Present: Hon. Wm. M. Byrne, District Judge.
Counsel for Plaintiff: Francis C. Whelan;
Counsel for Defendant: James R. Dooley, Ass't U. S. Att'y.

Proceedings:

For pretrial and setting for trial.

Attorney Dooley makes a statement that plaintiff does not have pretrial order, and Attorney Whelan makes the same statement.

Court Orders counsel present pretrial order, and that cause is continued to Feb. 16, 1956, 9:45 a.m., for trial.

JOHN A. CHILDRESS,
Clerk. [31]

[Title of District Court and Cause.]

PRETRIAL ORDER

At a conference held under Rule 16 F.R.C.P., by direction of William M. Byrne, Judge, the following admissions and agreements of fact were made by the parties and required no proof:

Agreements of Fact

I.

On April 20, 1954, a Warrant of Arrest was issued by the District Director, Immigration and Naturalization Service, Los Angeles, California, charging that the plaintiff herein was subject to deportation under the following charges:

(1) In that at time of entry he was within one [32] or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, aliens who have been convicted of a crime involving moral turpitude, under Sec. 212(a)(9) of the Act, to wit: Making false and fraudulent income tax returns, in violation of Title 26, United States Code, Sec. 145(b);

(2) In that, at the time of entry he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, aliens who have procured a visa, or other documentation, by fraud or by wilfully misrepresenting a material fact, under Sec. 212(a)(19) of the Act.

II.

Pursuant to the aforementioned Warrant of Arrest, a deportation hearing was held at Los Angeles, California, on May 11, 1954, and at this hearing there was received in evidence and made a part of the record a judgment of the United States District Court for the Southern District of California dated March 27, 1954, wherein the plaintiff was convicted on his plea of nolo contendere of violating Title 26 U. S. C. Sec. 145(b).

III.

On May 25, 1954, the Special Inquiry Officer who presided at the aforementioned deportation hearing rendered his decision ordering that the plaintiff be deported from the United States in the manner provided by law on the charges contained in the warrant of arrest.

IV.

On June 7, 1954, an administrative appeal was taken from the decision of the Special Inquiry Officer mentioned above; however, on June 25, 1954, before said appeal was decided, plaintiff filed a motion to reopen and reconsider before the Special Inquiry Officer who presided at the deportation hearing; and on June 30, 1954, said [33] Special Inquiry Officer ordered that the deportation hearing be reopened for the purpose, inter alia, of receiving new evidence.

V.

On November 16, 1954, a reopened hearing in deportation proceedings was held at Los Angeles,

California, and at this hearing there was received in evidence and made a part of the record an order of the United States District Court for the Southern District of California filed on June 24, 1954, correcting a clerical error and mistake in the above-mentioned judgment of March 27, 1944, and changing the same by correcting the wording "by making false and fraudulent income tax returns" to read "wilful attempts to evade and defeat income tax."

VI.

On December 7, 1954, the Special Inquiry Officer who presided at said reopened deportation hearing rendered his decision, again ordering that the plaintiff be deported from the United States in the manner provided by law on the charge contained in the warrant of arrest.

VII.

On December 17, 1954, an administrative appeal was taken by the plaintiff from the decision of the Special Inquiry Officer of December 7, 1954, and on October 3, 1955, this appeal was dismissed by the Board of Immigration Appeals, Department of Justice.

VIII.

On October 27, 1955, a Warrant of Deportation was issued directing that plaintiff be deported from the United States.

IX.

That plaintiff's complaint may be and the same is amended by interlining after the word "California" on line 8 of page 5 of said complaint the following:

"that defendant did on October 27, 1955, issue a warrant of deportation directing the deportation of plaintiff from the United States." [34]

X.

That a certified copy of the transcript of the deportation proceedings affecting plaintiff herein in the office of the Department of Justice Immigration and Naturalization Service at Los Angeles, California, will be produced by defendant and admitted into evidence at the trial of the above action.

Issues of Fact to Be Tried

None

Issues of Law

I.

Is there reasonable, substantial and probative evidence to support the outstanding order of deportation against the plaintiff?

II.

Were the deportation proceedings relating to the plaintiff fair, in accordance with law, and in accordance with plaintiff's constitutional rights?

III.

Does the offense of wilfully attempting to evade and defeat income tax in violation of 28 U.S.C. Sec. 145(b) constitute a crime involving moral turpitude within the meaning of Section 212(a)(9) of the Immigration and Nationality Act?

IV.

Was the crime of which plaintiff was convicted a crime involving moral turpitude within the meaning of Section 212(a)(9) of the Immigration and Nationality Act?

V.

Must an alien who has been convicted of a crime upon his plea of nolo contendere admit such conviction in his application for an immigration [35] visa?

VI.

Assuming that the crime of which plaintiff was convicted did not involve moral turpitude, was such conviction a material fact which had to be set forth in his application for an immigration visa?

VII.

Does the phrase "crime involving moral turpitude," insofar as it applies to the crime of wilful attempt to defeat or evade income tax have a sufficiently definite meaning to be a constitutional standard for deportation?

The foregoing admissions of fact have been made by the parties in open Court at the pretrial conference; and issues of fact and law being thereupon stated and agreed to, the Court makes this order which shall govern the course of the trial unless modified to prevent manifest injustice.

Dated this 16th day of February, 1956.

/s/ WM. M. BYRNE,
Judge of the United States
District Court.

The foregoing Pretrial Order is hereby approved:

/s/ FRANCIS C. WHELAN,
Attorney for Plaintiff.

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division,

JAMES R. DOOLEY,
Assistant U. S. Attorney,

By /s/ JAMES R. DOOLEY,
Attorneys for Defendant.

Lodged February 14, 1956.

[Endorsed]: Filed February 16, 1956. [36]

[Title of District Court and Cause.]

MINUTES OF THE COURT

February 16, 1956

Present: Hon. Wm. M. Byrne, District Judge.

Counsel for Plaintiff: Francis C. Whelan.

Counsel for Defendant: James R. Dooley, Assistant U. S. Attorney.

Proceedings:

For trial. At 9:55 a.m. court convenes herein, and Court orders trial proceed.

Counsel stipulate that administrative file be received in evidence.

Defendant's Exhibit A is received in evidence.

Defendant rests.

Attorney Whelan argues to the Court for plaintiff.

At 10:55 a.m. court recesses. At 11:10 a.m. court reconvenes hearing, and counsel being present, Court orders trial proceed.

Attorney Whelan resumes argument.

Attorney Dooley argues to the Court in behalf of defendant.

Attorney Whelan argues further to the Court.

Court makes a short statement and takes the matter under submission; counsel to file memoranda 15 x 15, plaintiff to file first.

JOHN A. CHILDRESS,
Clerk. [37]

United States District Court, Southern District of California, Central Division

No. 18970-WB—Civil

TSEUNG CHU, Also Known as BOW QUONG CHEW, Also Known as TSEUNG BOW-QUONG CHEW, Also Known as THOMAS BOWQUONG CHEW,

Plaintiff,

vs.

GORDON L. CORNELL, Acting Officer in Charge of United States Department of Justice Immigration and Naturalization Service at Los Angeles, California,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The above-entitled matter having come on for trial on February 16, 1956, in the above-entitled Court before the Hon. William M. Byrne, Judge presiding, without a jury; the plaintiff being represented by his attorney, Francis C. Whelan, and the defendant being represented by his attorneys, Laughlin E. Waters, United States Attorney; Max F. Deutz and James R. Dooley, Assistant U. S. Attorneys, by James R. Dooley, and counsel for the parties hereto having stipulated that a certified record of deportation proceedings relating to the plaintiff should be received in evidence, and the Court having received the same; and the Court

having heard the arguments of counsel, and having taken the within cause under submission; and the Court having reviewed the aforementioned [38] record of deportation proceedings relating to the plaintiff, and being fully advised in the premises, now makes the following findings of fact and conclusions of law:

Findings of Fact

I.

Plaintiff is an alien, a native of China. He last entered the United States on August 11, 1953, as a returning resident alien upon presentation of a non-quota immigrant visa issued on April 15, 1953, at the American Consulate General at Hong Kong.

II.

On April 20, 1954, a Warrant of Arrest was issued by the District Director, Immigration and Naturalization Service, Los Angeles, California, charging that the plaintiff herein was subject to deportation under the following charges:

(1) In that at time of entry he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, aliens who have been convicted of a crime involving moral turpitude, under Sec. 212(a)(9) of the Act, to wit: Making false and fraudulent income tax returns, in violation of Title 26, United States Code, Sec. 145(b);

(2) In that, at the time of entry, he was within one or more of the classes of aliens excludable by

the law existing at the time of such entry, to wit, aliens who have procured a visa, or other documentation, by fraud or by wilfully misrepresenting a material fact, under Sec. 212(a)(19) of the Act.

III.

Pursuant to the aforementioned Warrant of Arrest, a deportation hearing was held at Los Angeles, California, on May [39] 11, 1954, and at this hearing there was received in evidence and made a part of the record a judgment of the United States District Court for the Southern District of California dated March 27, 1944, wherein the plaintiff was convicted on his plea of nolo contendere of violating Title 26, U.S.C., Sec. 145(b).

IV.

On May 25, 1954, the Special Inquiry Officer who presided at the aforementioned deportation hearing rendered his decision ordering that the plaintiff be deported from the United States in the manner provided by law on the charges contained in the warrant of arrest.

V.

On June 7, 1954, an administrative appeal was taken from the decision of the Special Inquiry Officer mentioned above; however, on June 25, 1954, before said appeal was decided, plaintiff filed a motion to reopen and reconsider before the Special Inquiry Officer who presided at the deportation hearing; and on June 20, 1954, said Special Inquiry Officer ordered that the deportation hearing be re-

opened for the purpose, inter alia, of receiving new evidence.

VI.

On November 16, 1954, a reopened hearing in deportation proceedings was held at Los Angeles, California, and at this hearing there was received in evidence and made a part of the record an order of the United States District Court for the Southern District of California filed on June 24, 1954, correcting a clerical error and mistake in the abovementioned judgment of March 27, 1944, and changing the same by correcting the wording "by making false and fraudulent income tax returns" to read "wilful attempts to evade and defeat income tax."

VII.

On December 7, 1954, the Special Inquiry Officer who [40] presided at said reopened deportation hearing rendered his decision, again ordering that the plaintiff be deported from the United States in the manner provided by law on the charge contained in the warrant of arrest.

VIII.

On December 17, 1954, an administrative appeal was taken by the plaintiff from the decision of the Special Inquiry Officer of December 7, 1954, and on October 3, 1955, this appeal was dismissed by the Board of Immigration Appeals, Department of Justice. On October 27, 1955, a Warrant of Deportation was issued directing that plaintiff be deported from the United States.

IX.

The Immigration officials who acted in connection with the deportation proceedings relating to plaintiff had jurisdiction and authority to act.

X.

There is reasonable, substantial and probative evidence to support the decision of deportability, the order of deportation, and the warrant of deportation.

XI.

The deportation proceedings relating to plaintiff were fair, were in accordance with law, and in accordance with plaintiff's constitutional rights.

Conclusions of Law

I.

This Court has jurisdiction of the within cause under the provisions of Section 10 of the Act of June 11, 1946 (Administrative Procedure Act), 60 Stat. 243, 5 U.S.C.A. § 1009.

II.

The Immigration officials who acted in connection with [41] the deportation proceedings relating to plaintiff had jurisdiction and authority to act.

III.

There is reasonable, substantial and probative evidence to support the decision of deportability, the order of deportation, and the warrant of deportation outstanding against the plaintiff.

IV.

The deportation proceedings relating to the plaintiff were fair, were in accordance with law, and were in accordance with the plaintiff's constitutional rights.

V.

The crime of which plaintiff was convicted, wilful attempts to evade and defeat income tax in violation of Title 26, U. S. Code, Section 145(b), constitutes a crime involving moral turpitude within the meaning of Section 212(a)(9) of the Immigration and Nationality Act.

VI.

Plaintiff was under a duty to disclose his conviction for violating Title 26, U.S. Code, Section 145(b), in his application for an immigration visa, notwithstanding the fact that such conviction was upon his plea of nolo contendere.

VII.

Plaintiff's conviction for violating Title 26, U.S. Code, Section 145(b), was a material fact which plaintiff was under a duty to disclose in his application for an immigration visa.

VIII.

The phrase "crime involving moral turpitude" has a sufficiently definite meaning to afford a constitutional standard for deportation both on its face and as applied to plaintiff's conviction for violating Title 26, U.S. Code, Section 145(b). [42]

IX.

The order of deportation outstanding against the plaintiff, and the warrant of deportation based thereon, are valid, and the plaintiff is deportable pursuant to said order and warrant.

X.

Judgment should be entered in favor of the defendant and against the plaintiff, denying the relief prayed for in plaintiff's Complaint and awarding to the defendant his costs incurred herein.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed:

1. That judgment is hereby entered in favor of the defendant and against the plaintiff, denying the relief prayed for in plaintiff's Complaint.

2. That the defendant have his costs incurred herein, taxed at $20.00.

Dated: This 11th day of June, 1956.

/s/ WM. M. BYRNE,
U. S. District Judge.

Affidavit of Service by Mail attached.

Lodged May 31, 1956.

[Endorsed]: Filed June 11, 1956.

Docketed and entered June 11, 1956. [43]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Plaintiff Tseung Chu, also known as Bow Quong Chew, also known as Tseung Bowquong Chew, also known as Thomas Bowquong Chew, hereby gives notice to defendant Gordon L. Cornell, Acting Officer in Charge of United States Department of Justice Immigration and Naturalization Service at Los Angeles, California, and to the District Court of the United States for the Southern District of California, Central Division, of plaintiff's appeal to the United States Court of Appeals for the Ninth Circuit from the judgment of the United States District Court for the Southern District of California, Central Division, in the above-entitled action, which judgment was entered and docketed in the above action on June 11, 1956, in the records of said United States District Court.

Dated: August 9, 1956.

/s/ FRANCIS C. WHELAN,
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 9, 1956. [45]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING APPEAL

This matter coming on for hearing upon the motion of plaintiff, appearing through his attorney of record, Francis C. Whelan, and good cause appearing therefor,

It Is Hereby Ordered that the time for filing the record on appeal in the United States Court of Appeals for the Ninth Circuit from the judgment in the above-entitled action and for docketing the appeal from said judgment in the United States Court of Appeals for the Ninth Circuit may be and is hereby extended to and including the 6th day of November, 1956.

Dated this 17th day of September, 1956.

/s/ WM. M. BYRNE,
United States District Judge.

[Endorsed]: Filed September 17, 1956. [47]

In the District Court of the United States, Southern District of California, Central Division

No. Civ. 18,970-WB

TSEUNG CHU, etc.,

Plaintiff,

vs.

GORDON L. CORNELL, etc.,

Defendant.

Honorable William M. Byrne,
District Judge, Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

February 16, 1956

Appearances:

For the Plaintiff:
FRANCIS C. WHELAN.

For the Defendant:
JAMES R. DOOLEY,
Assistant U. S. Attorney.

February 16, 1956—9:45 A.M.

The Court: Call the calendar.

The Clerk: Tseung Chu, etc., versus Gordon L. Cornell, for trial.

Mr. Whelan: Ready for the Plaintiff.

Mr. Dooley: Ready for the Defendant, your Honor.

The Court: You may proceed. You don't have the proposed pretrial order, do you?

Mr. Dooley: I left that with your Honor a few days ago.

The Court: The memorandum, I believe.

Mr. Dooley: No, the Order itself was signed by both counsel and I left it with the Clerk.

The Court: I assume you stipulate that the administrative file may be received in evidence?

Mr. Whelan: Yes.

Mr. Dooley: Will the Clerk please mark this document, which purports to be an authenticated copy of the record of Immigation and Naturalization Service relating to the deportation proceedings of Tseung Chu, as Defendant's A for identification?

The Court: I assume you have no evidence to offer, Mr. Whelan, and you rest?

Mr. Whalen: Yes. **[1*]**

Mr. Dooley: Pursuant to stipulation, Defendant offers this in evidence, your Honor, as Defendant's A.

The Court: It will be received as Defendant's Exhibit A.

Defendant rests?

Mr. Dooley: Defendant rests, your Honor.

The Court: All right. You may proceed with your argument.

(Argument of counsel to the Court.)

The Court: This case involves a question of law. I want to congratulate counsel; you have both filed

***Page numbering appearing at foot of page of original Reporter's Transcript of Record.**

very elaborate briefs, and you have both presented able and skillful argument. I will take the matter under submission and I want to make a study of the story involved. In the meantime, so that you may present and I may have, also, before me at that same time your answers to those matters raised by counsel on the other side, you may file a supplemental memorandum within fifteen days, and the Defendant may have fifteen days thereafter to file a supplemental memorandum. Now, of course, this supplemental memorandum I don't want to be a rehash of the matter you have gone into in your former memoranda, but those matters that you have in mind in replying to the memorandum of counsel and, of course, you may include such matters as you want to even though you mentioned them in oral argument again, if you want to call them to my [2] attention, as they may have slipped my mind. So, you will have fifteen days to file that memoranda and the Defendant will have fifteen thereafter within which to file his reply.

(Whereupon, the Court recessed at 11:55 o'clock a.m.) [3]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official (pro tempore) court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the

above-entitled cause on the date specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 24th day of September, 1956.

/s/ FERAL M. HARVEY,
Official Reporter
(Pro Tempore).

[Endorsed]: Filed September 26, 1956.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages, numbered 1 to 53, inclusive, containing the original

Complaint;

Order of Transfer Pursuant to Low-Number Rule;

Affidavit for Order Permitting Amendment of Complaint;

Order Permitting Amendment of Complaint;

Answer to Complaint;

Plaintiff's Pretrial Order;

Findings of Fact, Conclusions of Law and Judgment;

Notice of Appeal;

Order Extending Time for Filing Record on Appeal;

Designation of Contents of Record on Appeal;

Stipulation that Original Papers and Exhibit may be sent to U. S. Circuit Court of Appeals for the Ninth Circuit and Order thereon;

and a full, true and correct copy of the Minutes of the Court on

December 21, 1955;
January 23, 1956;
January 30, 1956;
February 6, 1956;
February 16, 1956;

a full, true and correct copy of Order for Pretrial Hearing;

B. 1 volume of Reporter's Official Transcript of Proceedings had on February 16, 1956;

C. Defendant's Exhibit No. A.

I further certify that my fee for preparing the foregoing record, amounting to $1.60, has been paid by appellant.

Witness my hand and the seal of said District Court this 31st day of October, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk;

/s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15,344. United States Court of Appeals for the Ninth Circuit. Tseung Chu, Also Known as Bow Quong Chew, Also Known as Tseung Bowquong Chew, Also Known as Thomas Bowquong Chew, Appellant, vs. Gordon L. Cornell, Acting Officer in Charge of United States Department of Justice, Immigration and Naturalization Service, of Los Angeles, California, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed November 1, 1956.

Docketed November 2, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

TSEUNG CHU, Also Known as BOW QUONG CHEW, Also Known as TSEUNG BOW-QUONG CHEW, Also Known as THOMAS BOWQUONG CHEW,

Appellant,

vs.

GORDON L. CORNELL, Acting Officer in Charge of United States Department of Justice, Immigration and Naturalization Service, at Los Angeles, California,

Appellee.

CONCISE STATEMENT OF POINTS UPON WHICH APPELLANT RELIES ON APPEAL

Comes now appellant Tseung Chu, also known as Bow Quong Chew, also known as Tseung Bowquong Chew, also known as Thomas Bowquong Chew, and pursuant to Rule 17, subdivision 6, of the rules of the above-entitled Court, makes and files this concise statement of the points upon which he intends to rely on appeal:

1. That the United States District Court erred in making its Finding of Fact No. IX, i.e., erred in finding that the immigration officials who acted in connection wth the deportaton proceedings relating to this appellant had jurisdiction and authority to act;

2. That the United States District Court erred in making its Finding of Fact No. X, i.e., erred in finding that there is reasonable, substantial and probative evidence to support the decision of deportability, the order of deportation and the warrant of deportation with respect to this appellant;

3. That the United States District Court erred in making its Finding of Fact No. XI, i.e., erred in finding that the deportation proceedings relating to this appellant were fair, were in accordance with law, and in accordance with appellant's constitutional rights;

4. That the United States District Court erred in making its Conclusion of Law No. II, i.e., erred in making its Conclusion of Law that the immigration officials who acted in connection with the deportation proceedings relating to this appellant had jurisdiction and authority to act;

5. That the United States District Court erred in making its Conclusion of Law No. III, i.e., erred in making its Conclusion of Law that there is reasonable, substantial and probative evidence to support the decision of deportability, the order of deportation and the warrant of deportation outstanding against this appellant;

6. That the United States District Court erred in making its Conclusion of Law No. IV, i.e., erred in making its Conclusion of Law that the deportation proceedings relating to this appellant were fair, were in accordance with law, and were in

accordance with this appellant's constitutional rights;

7. That the United States District Court erred in making its Conclusion of Law No. V, i.e., erred in making its Conclusion of Law that the crime of which this appellant was convicted, wilful attempts to evade and defeat the income tax in violation of Title 26, United States Code, Sec. 145(b), constitutes a crime involving moral turpitude within the meaning of Section 212(a)(9) of the Immigration and Nationality Act;

8. That the United States District Court erred in making its Conclusion of Law No. VI, i.e., erred in making its Conclusion of Law that this appellant was under a duty to disclose his conviction for violating Title 26, United States Code, Sec. 145(b), in his application for an immigration visa notwithstanding the fact that such conviction was upon this appellant's plea of nolo contendere;

9. That the United States District Court erred in making its Conclusion of Law No. VII, i.e., in making its Conclusion of Law that this appellant's conviction for violating Title 26, United States Code, Sec. 145(b), was a material fact which this appellant was under a duty to disclose in his application for an immigration visa;

10. That the United States District Court erred in making its Conclusion of Law No. VIII, i.e., erred in making its Conclusion of Law that the phrase, "crime involving moral turpitude," has a

sufficiently definite meaning to afford a constitutional standard for deportation, both on its face and as applied to this appellant's conviction for violation of Title 26, United States Code, Sec. 145(b);

11. That the United States District Court erred in making its Conclusion of Law No. IX, i.e., erred in making its Conclusion of Law that the order of deportation outstanding against this appellant and the warrant of deportation based thereon are valid and that this appellant is deportable pursuant to said order and warrant;

12. That the United States District Court erred in making its Conclusion of Law No. X, i.e., erred in making its Conclusion of Law that judgment should be entered in favor of defendant appellee and against this plaintiff and appellant;

13. That the United States District Court erred in not finding that there is no reasonable, substantial or probative evidence to support the decision of deportability, the order of deportation, or the warrant of deportation made with respect to this appellant;

14. That the United States District Court erred in not ruling as a matter of law that the crime of which this appellant had been convicted, i.e., wilful attempts to evade and defeat income tax, in violation of Title 26, United States Code, Sec. 145(b), does not constitute a crime involving moral turpi-

tude within the meaning of Section 212(a)(9) of the Immigration and Nationality Act;

15. That the United States District Court erred in not ruling as a matter of law that this appellant was under no duty to disclose his conviction upon his plea of nolo contendere of a violation of Title 26, United States Code, Sec. 145(b), in his application for an immigration visa;

16. That the judgment of the United States District Court is not supported by the evidence introduced;

17. That the judgment of the United States District Court is against the law and is based upon erroneous Conclusions of Law;

18. That the United States District Court erred in not giving judgment for this plaintiff and appellant as prayed for in his complaint.

Dated this 13th day of November, 1956.

/s/ FRANCIS C. WHELAN,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 15, 1956.

No. 15344.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TSEUNG CHU, Also Known as BOW QUONG CHEW, Also Known as TSEUNG BOWQUONG CHEW, Also Known as THOMAS BOWQUONG CHEW,

Appellant,

vs.

GORDON L. CORNELL, Acting Officer in Charge of United States Department of Justice, Immigration and Naturalization Service, of Los Angeles, California,

Appellee.

BRIEF FOR APPELLEE.

LAUGHLIN E. WATERS,
United States Attorney,
RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division,
JAMES R. DOOLEY,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

FILED
MAY - 4 1957
PAUL P. O'BRIEN, C

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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TABLE OF AUTHORITIES CITED

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No. 15344.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TSEUNG CHU, Also Known as BOW QUONG CHEW, Also Known as TSEUNG BOWQUONG CHEW, Also Known as THOMAS BOWQUONG CHEW,

Appellant,

vs.

GORDON L. CORNELL, Acting Officer in Charge of United States Department of Justice, Immigration and Naturalization Service, of Los Angeles, California,

Appellee.

BRIEF FOR APPELLEE.

Jurisdiction.

Appellant, plaintiff below, brought action in the District Court for review of an order of deportation outstanding against him, and praying that such order be declared void [R. 3-15].[1] Judgment was entered in favor of appellee [R. 52]. The Court below had jurisdiction of appellant's action under the provisions of Section 10 of the Act of June 11, 1946 (Administrative Procedures Act), 60 Stat. 243, 5 U. S. C. A., Sec. 1009 (*Shaughnessy v. Pedreiro,* 349 U. S. 48 (1955)) and its judgment, being a final decision, jurisdiction is conferred upon this Court by 28 U. S. Code, Section 1291.

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[1]"R." refers to the Printed Transcript of Record. "Br." indicates references to appellant's Opening Brief. Exhibits to the deportation hearing which were attached in numerical order and which are included as part of Defendant's Exhibit A will be referred to as "Hg. Ex. .....".

Statement of the Case.

Appellant is an alien, a native of China [R. 5]. He last entered the United States on August 11, 1953, as a returning resident alien upon presentation of a non-quota immigrant visa issued on April 15, 1953, at the American Consulate General at Hong Kong [R. 5, Hg. Ex. 5]. After deportation hearings held pursuant to a Warrant of Arrest [R. 15-16, Hg. Ex. 1], appellant was ordered deported from the United States by a Special Inquiry Officer on October 3, 1955 upon the following two grounds: (1) that prior to his last entry into the United States he had been convicted of a crime involving moral turpitude; (2) that he had procured a visa for such last entry by fraud or by wilfully misrepresenting a material fact [R. 39-41]. At the deportation hearings relating to appellant there was received in evidence and made a part of the record a judgment of the United States District Court for the Southern District of California, dated March 27, 1944, wherein appellant was convicted on his plea of *nolo contendere* of violating Title 26, U. S. C., Sec. 145(b) (1939 Int. Rev. Code) by wilful attempts to evade and defeat income tax [R. 40-41, Hg. Exs. 4 and 7]; and the Special Inquiry Officer found that appellant's visa, issued on April 15, 1953 [Hg. Ex. 5] had been procured by fraud or by wilfully misrepresenting a material fact through appellant's non-disclosure of his conviction on his visa application [Deft. Ex. "A"].

On December 17, 1954, an administrative appeal was taken by appellant from the decision of the Special Inquiry Officer; and on October 3, 1955, this appeal was dismissed by the Board of Immigration Appeals, Department of Justice. On October 27, 1955, a Warrant of

Deportation was issued directing that appellant be deported from the United States [R. 41, Deft. Ex. A].

On November 4, 1955 appellant filed a Complaint in the court below for review of the order of deportation outstanding against him and praying that this order be declared void and of no force and effect [R. 3-15]. The District Court upheld the validity of the order and warrant of deportation and entered judgment in favor of appellee [R. 46-52].

Issues Presented.

1. Does the crime of which appellant was convicted, wilful attempts to evade and defeat the income tax in violation of Title 26, United States Code, Section 145(b), constitute a crime involving moral turpitude within the meaning of Section 212(a)(9) of the Immigration and Nationality Act?

2. Was appellant's conviction for violating Title 26, United States Code, Section 145(b), a material fact which appellant was under a duty to disclose in his application for an immigration visa?

3. Was appellant under a duty to disclose his conviction for violating Title 26, United States Code, Section 145(b) in his application for an immigration visa notwithstanding the fact that such conviction was upon his plea of *nolo contendere?*

4. Does the phrase "crime involving moral turpitude" have a sufficiently definite meaning to afford a constitutional standard for deportation, both on its face and as applied to appellant's conviction for violation of Title 26, United States Code, Section 145(b)?

Statutes Involved.

Section 145(b) of the Internal Revenue Code of 1939, 53 Stat. 63, 26 U. S. C. A., Sec. 145(b), provides in pertinent part:

> "Any person . . . who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter . . . shall be guilty of a felony. . . ."

Section 212(a) of the Immigration and Nationality Act of 1952, 66 Stat. 182, 8 U. S. C. A., Sec. 1182(a), insofar as is pertinent to this proceeding, provides:

> "(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * * * * *
>
> "(9) Aliens who have been convicted of a crime involving moral turpitude (other than a purely political offense). . . ."
>
> * * * * * * * *
>
> "(19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact;"

Section 241(a)(1) of the Immigration and Nationality Act of 1952, 66 Stat. 204, 8 U. S. C. A., Sec. 1251(a)(1) provides:

> "(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> "(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;"

ARGUMENT.

I.

The Crime of Which Appellant Was Convicted, Wilful Attempts to Evade and Defeat the Income Tax in Violation of Title 26, United States Code, Section 145(b), Constitutes a Crime Involving Moral Turpitude Within the Meaning of Section 212(a)(9) of the Immigration and Nationality Act.

A. The Crime of Wilfully Attempting to Evade or Defeat Income Tax in Its Inherent Nature Involves Moral Turpitude.

Appellee submits that the crime of wilfully attempting to evade or defeat income tax in violation of Section 145 (b) of the Internal Revenue Code of 1939, in its inherent nature involves moral turpitude. This position is supported by the recent decision in *Chanan Din Khan v. Barber,* 147 Fed. Supp. 771 (N. D. Cal., 1957), where the precise issue was involved. In that case the Court, relying upon the leading case of *Jordan v. De George,* 341 U. S. 223 (1951), found that a violation of Section 145(b) is a crime involving moral turpitude, authorizing deportation under the provisions of Section 241(a)(4) of the Immigration and Nationality Act of 1952, 66 Stat. 204, 8 U. S. C. A., Sec. 1251(a)(4).[2] Answering most of the contentions raised by appellant in the instant appeal, the Court declared (pp. 774-775):

> "Section 145(b) speaks in terms of 'wilfulness', which has been defined by the Courts as meaning 'bad faith', 'bad purpose', 'evil motive' and 'tax

---

[2]This section provides for the deportation of an alien who at any time after entry is convicted of two crimes involving moral turpitude.

> evasion motive,' (citations). With these definitions in mind, the Courts have, with apparent unanimity, held that in order for a conviction under § 145(b) to stand, the Government is required to prove that the evading taxpayer had a specific intent to evade taxation, *amounting to an intent to defraud the United States.* Fraud is so inextricably woven into the term, 'wilfully' as it is employed in § 145(b), that it is clearly an ingredient of the offense proscribed by that section. Only by creating unwarranted semantic distinctions could a contrary conclusion be reached." (Emphasis of the Court.)

The cases cited by the Court in support of the above quotation make it abundanly clear that an intent to defraud the United States is a prerequisite to conviction under Section 145(b) (*Spies v. United States,* 317 U. S. 492, 497, 498 (1943); *Legatos v. United States,* 222 F. 2d 678 (C. A. 9, 1955); *Bloch v. United States,* 221 F. 2d 786 (C. A. 9, 1955); *Wardlaw v. United States,* 203 F. 2d 884 (C. A. 5, 1953); *United States v. Raub,* 177 F. 2d 312 (C. A. 7, 1949); *United States v. Clark,* 123 Fed. Supp. 608 (S. D. Cal., 1954). In *Bloch v. United States, supra,* this Court in commenting upon an instruction to the jury in a prosecution under Section 145(b), declared (p. 788):

> "Proceeding then to a consideration of the Court's charge we find the trial Court instructed the jury in part as follows:
>
> > 'The attempt must be wilful, that is, intentionally done with the intent that the government is to be defrauded of the income tax due from the defendant.'
>
> That is a correct statement of the law, because the intent involved in the offense with which appellant

> here was charged is a specific intent involving the bad purpose and evil motive to evade or defeat the payment of his income tax. * * *"

While, as urged by appellant (Br. 20), "wilful" is a word of many meanings, the courts have construed "wilful" as contained in Section 145(b) to require an evil motive to accomplish that which the statute condemns. (*Spies v. United States, supra; United States v. Murdock,* 290 U. S. 389, 395 (1933); *Bloch v. United States, supra; Wardlaw v. United States, supra.*) Since in prosecutions for violations of Section 145(b), the word "wilful" has acquired a fixed meaning; the examples of other minor crimes cited by appellant (Br. 22) wherein the word "wilful" is employed are irrelevant. As the Court pointed out in *Wardlaw v. United States, supra* (p. 885):

> "It is now settled that 'willfully', as used in this offense, means more than intentionally or voluntarily, and includes an evil motive or bad purpose, so that evidence of an actual bona fide misconception of the law, such as would negative knowledge of the existence of the obligation, would, if believed by the jury, justify a verdict for the defendant."

The attitude of the Supreme Court towards the issue here involved was indicated in *Jordan v. De George, supra.* While that case involved a conspiracy to defraud the United States of taxes on distilled liquors instead of a violation of Section 145(b); the Supreme Court, in a footnote to language pointing out that where fraud had been proved, both federal and state courts had universally found moral turpitude (341 U. S. pp. 227-228), apparently placed its stamp of approval upon a state court

decision holding that a violation of Section 145(b) involved moral turpitude (p. 228, fn. 13):

> "* * * One state court has specifically held that *the wilful evasion of federal income taxes constitutes moral turpitude.* Louisiana State Bar Assn. v. Steiner, 204 La. 1073, 16 So. 2d 843 (1944)." (Emphasis added.)

Appellant relies upon *United States v. Scharton,* 285 U. S. 518 (1932) to support his contention that wilful attempts to evade or defeat the income tax do not involve fraud. In the *Scharton* decision, however, the Court was not concerned with whether fraud was necessary for the existence of the crime; but rather whether Congress intended that a six-year statute of limitations should be applicable to the offense. It held that Congress intended, in order for the six year limitations proviso to apply, that the statute "must be specifically couched in terms of fraud" (See, *Chanan Din Khan v. Barber, supra,* at page 775, fn. 5). A similar distinction exists as to *United States v. Noveck,* 271 U. S. 201 (1926), upon which appellant relies.

The decisions in *United States v. Carrollo,* 30 Fed. Supp. 3 (W. D. Mo., 1939) and *United States v. Pendergast,* 28 Fed. Supp. 601, 609 (D. C. Mo., 1939), advanced by appellant to support his view that a violation of Section 145(b) does not involve moral turpitude, antedated *Spies v. United States,* 317 U. S. 492 (1943), where the serious nature of the crime was delineated. In the *Spies* decision the Supreme Court discussed the difference between 26 U. S. C., Sec. 145(a), which is a misdemeanor, and 26 U. S. C., Sec. 145(b), which is a felony. After describing the graduated system of penalties and punishments in connection with income tax violations, the Court

characterized the "serious and inclusive felony" (p. 497) defined in Section 145(b) as the "climax of this variety of sanctions" (p. 497), and as the "gravest of offenses against the revenues" (p. 499).

Moreover, the question of fraud as an element of moral turpitude was not reached in the *Carrolo* case, and the holding that income tax evasion did not involve moral turpitude was no more than a dictum. (See, *Chanan Din Khan v. Barber, supra,* at page 775, fn. 6.) The reasoning of the *Pendergast* decision appears vulnerable, in view of the many factors which may enter into the Government's prosecution of tax evasion cases. (See, Winer, "An Appraisal of Criminal and Civil Penalties in Federal Tax Evasion Cases", 30 Boston Univ. Law Rev., 387, 388-389.) It would seem that failure to prosecute, or even laxity in prosecution, would be unable to modify the inherent nature of the crime.

While *In re Hallinan*, 43 Cal. 2d 243, 272 P. 2d 768 (1954) holds that an intent to defraud is not an essential element of Section 145(b), and that therefore moral turpitude is not necessarily present; this decision seems to have been based primarily upon the *Scharton, Carrollo,* and *Pendergast* decisions previously distinguished. Nor did the court in *Hallinan* mention the apparent approval by the Supreme Court of the United States of the decision in *Louisiana State Bar Ass'n v. Steiner,* 204 La. 1073, 16 So. 2d 843, which reached an opposite result. (See, 341 U. S. 223, at p. 228, fn. 13.) Appellant submits, therefore, that the reasoning in *Chanan Din Khan v. Barber, supra,* is more persuasive than that in *Hallinan* and should be adopted by this Court.

B. The Indictment Upon Which Plaintiff Was Convicted Shows Moral Turpitude.

If the crime of wilful attempts to evade or defeat income tax in violation of Section 145(b) of the Internal Revenue Code of 1939 in its inherent nature involves moral turpitude, the Court need not reach the issue here presented. However, while the question is not free from doubt, appellee believes that the *material facts* as set forth in the indictment may also be considered in determining whether the crime of which appellant was convicted involved moral turpitude. Appellee recognizes that in determining the issue of moral turpitude the Court may not go behind the record of conviction and consider the evidence; however, as the authorities agree, the record of conviction consists of the charge (indictment), plea, verdict, and sentence. (*United States ex rel Zaffarano v. Corsi,* 63 F. 2d 757 (C. C. A. 2, 1933); *Vidal Y Planas v. Landon,* 104 Fed. Supp. 384 (S. D. Cal., 1953); *United States ex rel Teper v. Miller,* 87 Fed. Supp. 285 (S. D. N. Y., 1949); *United States ex rel Guarino v. Uhl,* 27 Fed. Supp. 135 (S. D. N. Y., 1939), reversed on other grounds, 107 F. 2d 399.)

In *United States ex rel Zaffarano v. Corsi, supra,* the Court indicated that moral turpitude might be determined either from the inherent nature of the crime or from matters set forth in the indictment when it said (p. 758):

> ". . . They must look only to the inherent nature of the crime *or to the facts charged in the indictment upon which the alien was convicted,* to find the moral turpitude requisite for deportation for this cause." (Emphasis added.)

While in the *Zaffarano* decision it was necessary for the court to examine the indictment in order to determine under which section of the New York statute the alien was convicted, the Court by its language did not indicate that this was the sole purpose for which the indictment might be considered. Upon Petition for Rehearing it was urged that the decision was inconsistent with the court's prior ruling in *Robinson v. Day,* 51 F. 2d 1022. In the latter case, now relied upon by appellant, the court had said that the particular circumstances under which the crime was committed might not be considered, and that "when by its definition it does not necessarily involve moral turpitude, the alien cannot be deported because in the particular instance his conduct was immoral." In reconciling this apparent inconsistency, the court declared (p. 759):

> "* * * *This language* (language in the Robinson case) *means that neither the immigration officials nor the court reviewing their decision may go outside the record of conviction* to determine whether in the particular instance the alien's conduct was immoral. And by the record of conviction we mean *the charge (indictment), plea, verdict, and sentence.* The evidence upon which the verdict was rendered may not be considered, nor may the guilt of the defendant be contradicted. So construed, there is no inconsistency between that opinion and this; and such is plainly the correct construction, because *it is the specific criminal charge of which the alien is found guilty and for which he is sentenced that conditions his deportation,* provided it involves moral turpitude. * * *" (Emphasis and words in parenthesis added).

In *Vidal Y Planas v. Landon, supra,* the Court considered a statement of the Court's findings as contained in a Spanish judgment in determining that the homicide committed did not involve moral turpitude. The Supreme Court itself in *Jordan v. De George, supra,* referred to the facts as set forth in the indictment. (See, 341 U. S. at p. 225, fn. 5.)

Even without considering the adjectives which appellant characterizes as surplusage (Br. 24), the indictment shows that appellant was convicted on four counts for wilfully attempting to defeat his income tax for the years 1937, 1938, 1939, and 1940. The indictment charges, *inter alia,* that the gross income of appellant for 1937 was $12,556.87; for 1938—$16,298.17; for 1939—$38,925.38; for 1940—$17,321.05; and that plaintiff falsely stated under oath in his income tax returns that his gross income for these four years was only $1,724.42, $3,778.21, $4,976.52, and $2,490.35 respectively. All counts charged that plaintiff concealed from the Collector of Internal Revenue his true and correct gross and net incomes during the four years mentioned. [Hg. Ex. 3.]

Assuming therefore, that the material facts set forth in the indictment may be considered, they show that the crime of which appellant was convicted involved moral turpitude, both by reason of fraud and perjury. (*United States ex rel. Popoff v. Reimer,* 79 F. 2d 513 C. C. A. 2, 1935); *Kaneda v. United States,* 278 Fed. 694 (C. C. A. 9, 1922).)

II.

Appellant's Conviction for Violating Title 26, United States Code, Section 145 (b) Was A Material Fact Which Appellant Was Under a Duty to Disclose in His Application for an Immigration Visa, Irrespective of Whether Such Crime Involves Moral Turpitude.

Appellant takes the position that if the crime of which he was convicted did not involve moral turpitude, it would not have been sufficient even if disclosed, to justify the refusal of a visa; and that therefore this conviction was not a material fact which appellant was under a duty to disclose in his application for an immigration visa. Appellee disagrees. The disclosure of this conviction, even if no moral turpitude was involved, would have been sufficient to justify the refusal of a visa, at least temporarily. The materiality of appellant's misrepresentation lies in the fact that it thwarted further inquiry by the officials charged with issuing visas, and prevented these officials from making a determination of whether the crime of which appellant was convicted involved moral turpitude. (*Ablett v. Brownell,* 240 F. 2d 625 (C. A. D. C., 1957); *Landon v. Clarke,* 239 F. 2d 631 (C. A. 1, 1956); *United States v. Flores-Rodriguez,* 237 F. 2d 405 (C. A. 2, 1956); *United States ex rel. Jankowski v. Shaughnessy,* 186 F. 2d 580 (C. A. 2, 1951); *cf. United States v. Montalbano,* 236 F. 2d 757, 759-760 (C. A. 3, 1956); *Corrado v. United States,* 227 F. 2d 780, 784 (C. A. 6, 1955), cert. den. 351 U. S. 925.)

The matter was aptly expressed in *United States ex rel Jankowski v. Shaughnessy, supra,* where the Court declared (p. 582):

> "* * * The misrepresentation and concealment were material. Had he disclosed those facts, they would have been enough to justify the refusal of a visa. *For surely they would have led to a temporary refusal, pending a further inquiry, the results of which might well have prompted a final refusal.*" (Emphasis added.)

The decisions of *United States ex rel. Iorio v. Day,* 34 F. 2d 920 (C. C. A. 2, 1929) and *United States ex rel. Leibowitz v. Schlotfeldt,* 94 F. 2d 263 (C. C. A. 7, 1938), upon which appellant relies, were distinguished in *Ablett v. Brownell, supra.* There, the Court declared, *inter alia* (p. 630):

> "* * * Both decisions appear to be premised on the point that, if the aliens had told the truth, they would nevertheless have been entitled to receive visas forthwith; certainly there is no indication that the truth would have prompted the consul to withhold a visa, pending investigation, in either case. *The crime in Iorio, unlike that here, was not one which would immediately raise the question of whether moral turpitude was involved.* * * *" (Emphasis added.)

III.

Appellant Was Under a Duty to Disclose His Conviction for Violating Title 26, United States Code, Section 145 (b) in His Application for an Immigration Visa, Notwithstanding the Fact That Such Conviction Was Upon His Plea of Nolo Contendere.

The fact that appellant's conviction was upon his plea of *nolo contendere* did not absolve him from the duty of disclosing such conviction upon his application for an immigration visa. In *United States ex rel. Bruno v. Reimer,* 98 F. 2d 92 (C. C. A. 2, 1938), an alien was ordered deported upon the ground that he had been twice sentenced to serve more than a year for crimes involving moral turpitude. He contended that since his first sentence, not being upon a plea of guilty but *nolo contendere,* was not a sentence and conviction within the meaning of the deportation statute. In rejecting this contention, the Court explained the nature of a conviction upon a plea of *nolo contendere* in the following language (pp. 92-93):

> "* * * It is true that the plea is not treated as a confession, which can be used against the accused elsewhere; but it gives the judge as complete power to sentence as a plea of guilty. (citation). And it is as conclusive of guilt for all purposes of prosecution under the indictment, (citations). Moreover, a sentence upon it is a conviction within the terms of a local statute applying to second offenders. (citation). The relator might succeed, therefore, if deportation depended upon his admission of *the commission of a crime,* as it may in the case of crimes committed before entry; but *since it depends upon conviction and sentence, conviction and sentence are the only relevant facts,* and the accused may be deported when-

ever these have been procured by any lawful procedure, as in this case they were." (Emphasis added.)

Similarly, in the case at bar, appellant stated in his visa application that he had never been *convicted,* not that he had never committed a crime. While under the decisions relied upon by appellant, he may not be estopped to proclaim his *innocence* in another proceeding, he was nevertheless under a duty to disclose his *conviction.*

IV.

The Phrase "Crime Involving Moral Turpitude" Has a Sufficiently Definite Meaning to Afford a Constitutional Standard for Deportation, Both on Its Face and as Applied to Appellant's Conviction for Violation of Title 26, United States Code, Section 145 (b).

In *Jordan v. De George,* 341 U. S. 223, 229-232 (1951), where the defendants had conspired to defraud the United States of taxes on distilled spirits, the Supreme Court held, with only one dissent, that the phrase "crime involving moral turpitude" was not void for vagueness, and that it had sufficiently definite meaning to be a constitutional standard for deportation.

Appellee submits that the same construction should be adopted in the instant case. While Section 145(b) of the Internal Revenue Code of 1939 does not mention fraud in specific language, the intent to defraud the United States is a prerequisite to conviction under this section. (*Spies v. United States,* 317 U. S. 492, 497, 498 (1943); *Legatos v. United States,* 222 F. 2d 678 (C. A. 9, 1955); *Bloch v. United States,* 221 F. 2d 786 (C. A. 9, 1955); *Wardlaw v. United States,* 203 F. 2d 884 (C. A. 5, 1953); *United States v. Raub,* 177 F. 2d 312 (C. A. 7, 1949); *United States v. Clark,* 123 Fed. Supp. 608 (S. D. Cal.,

1954). Appellant, having engaged in such fraudulent conduct, cannot contend that Congress had not sufficiently forewarned him by the phrase "crime involving moral turpitude" that the statutory consequence would be deportation.

While *Tan v. Phelan,* 333 U. S. 6 (1948) refers generally to resolving doubts in favor of the alien; even in a criminal case, where the doctrine of strict construction is well entrenched, the Supreme Court, in *United States v. Brown,* 333 U. S. 18 (1948) had occasion to declare (pp. 25-26):

> "* * * The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose. It does not require magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to the fair import of the whole remaining language. * * * it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers. * * *"

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the judgment of the District Court in favor of appellee, denying the relief prayed for in appellant's Complaint, should be affirmed.

Respectfully submitted,

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No. 15344

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TSEUNG CHU, also known as Bow Quong Chew, also known as Tseung Bowquong Chew, also known as Thomas Bowquong Chew,

Appellant,

vs.

GORDON L. CORNELL, Acting Officer in Charge of United States Department of Justice, Immigration and Naturalization Service at Los Angeles, California,

Appellee.

REPLY BRIEF OF APPELLANT.

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Appellee.

REPLY BRIEF OF APPELLANT.

ARGUMENT.

I.

The Crime of Which Appellant Was Convicted, Wilful Attempts to Evade and Defeat the Income Tax in Violation of Title 26, United States Code, Section 145(b), Does Not Constitute a Crime Involving Moral Turpitude Within the Meaning of Section 212(a)(9) of the Immigration and Nationality Act.

A. The Crime of Wilfully Attempting to Evade or Defeat Income Tax in Its Inherent Nature Does Not Involve Moral Turpitude.

Appellee in his brief asserts that the crime of wilfully attempting to evade or defeat income tax in violation of

Title 26, U. S. C., Section 145(b) (Int. Rev. Code of 1939), 53 Stat. 62, in its inherent nature involves moral turpitude. In support of his position appellee cites the decision in *Chanan Din Khan v. Barber* (N. D. Cal., 1957), 147 Fed. Supp. 771, and appellee urges that the case of *Jordan v. De George* (1951), 341 U. S. 223, 71 S. Ct. 703, 95 L. Ed. 886, supports the decision in *Chanan Din Khan v. Barber, supra,* as well as appellee's position in the case here at bar.

It is respectfully urged that the decision of the District Court in the case of *Chanan Din Khan v. Barber, supra,* is in error and that the crime of wilfully attempting to evade or defeat income tax does not in its inherent nature involve moral turpitude. (*Twentieth Century-Fox Film Corporation v. Lardner* (C. C. A. 9th, 1954), 216 F. 2d 844, 852.) It is respectfully urged that the decision in *Jordan v. De George, supra,* does not support the decision in the case of *Chanan Din Khan v. Barber,* nor does it support the position of appellee on this appeal, for the Supreme Court stated, as reported at page 232 of the official opinion in *Jordan v. De George:* "Fraud is the touchstone by which this case should be judged."

While appellee contends (Br. p. 8) that the case of *United States v. Scharton* (1932), 285 U. S. 518, 52 S. Ct. 416, 76 L. Ed. 917, does not hold that an intent to defraud is not a necessary element of Section 145(b) of Title 26, U. S. C., appellant respectfully urges that a careful reading of the decision in the *Scharton* case definitely establishes that an intent to defraud is not an element of the crime of evading or defeating income tax, and that the Court therein expressly holds that an intent to defraud the Government if alleged in an indictment charging a violation of Title 26, U. S. C., Section

145(b), would be surplusage "for it would be sufficient to plead and prove a wilful attempt to evade or defeat." (*United States v. Scharton, supra,* at pp. 518, 521; also see *United States v. Noveck,* 271 U. S. 201, 203, 46 S. Ct. 476, 70 L. Ed. 904, 905.)

The case of *Berra v. United States* (1956), 351 U. S. 131, 76 S. Ct. 685, 100 L. Ed. 1013, referred to in a footnote to the decision in *Chanan Din Khan v. Barber, supra,* does not in any way change the rule set forth in the cases of *United States v. Scharton, supra,* and *United States v. Noveck, supra.* Appellant respectfully submits that the language of the Supreme Court in the case of *Berra v. United States,* found at page 134 of the official opinion, was referring only to the facts in that particular case when the Court stated,

> "*for here the method of evasion charged was the filing of a false return,* and it is apparent that the facts necessary to prove that petitioner 'wilfully' attempted to evade taxes by filing a false return [Section 145(b)] were identical with those required to prove that he delivered a false return with 'intent' to evade taxes [Section 3616(a)]. *In this instance* Sections 145(b) and 3616(a) covered precisely the same ground." (Italics ours.)

The italicized portions of the quotation from the opinion of the Supreme Court in the *Berra* case, it is respectfully submitted, clearly make it evident that the Court was merely referring to the facts in the case there at bar. Appellee has fallen into a misapprehension of the inherent nature of the statute which is Title 26, U. S. C., Section 145(b) (1939 Int. Rev. Code). The cases cited in the case of *Chanan Din Khan v. Barber, supra,* and referred to on page 6 of appellee's brief herein, and which are concerned with instructions to the jury or sufficiency of

evidence to convict in prosecutions for defeating or evading income tax, are concerned only with a particular method used by the defendant or defendants involved to defeat or evade income tax, to wit, the filing of false and fraudulent income tax returns.

Congress did not define or limit the methods by which a wilful attempt to evade or defeat might be accomplished but provided that it might be accomplished "in any manner." (See *Spies v. United States,* 317 U. S. 492, 499, 63 S. Ct. 364, 87 L. Ed. 418.)

The inherent nature of the crime of wliful attempt to evade or defeat income tax is the doing by a taxpayer of an affirmative act with a bad purpose or evil motive, that is to say, with the purpose or motive of evading or defeating income tax. (See *Spies v. United States, supra,* and *Bateman v. United States* (C. C. A. 9, 1954), 212 F. 2d 61, 69.)

In order to arrive at the conclusion that the crime of wilful attempt to evade or defeat income tax involves moral turpitude one would have to go outside of the statutory provisions defining such crime; this cannot be done in a deportation proceeding. (*United States ex rel. Giglio v. Neelly* (C. C. A. 7, 1953), 208 F. 2d 337, 340.) Neither the Immigration officials nor the courts may consider the circumstances under which the crime was in fact committed when by its definition such crime does not necessarily involve moral turpitude. (*United States ex rel. Giglio v. Neelly, supra.*)

Appellee in his brief contends that the Supreme Court in its decision in the case of *Jordan v. De George, supra,* apparently placed its stamp of approval upon a state court decision, *i.e., Louisiana State Bar Association v. Steiner* (1944), 204 La. 1073, 1084, 16 So. 2d 843. The latter

case was concerned with a disbarment proceeding based upon a wilful evasion of Federal income taxes. While it is true that a footnote to the decision of the Supreme Court in the case of *Jordan v. De George, supra,* does include the statement found at page 8 of appellee's brief to the effect that the Louisiana Court there "specifically held that the wilful evasion of income taxes constitutes moral turpitude," it is respectfully submitted that a careful reading of the Louisiana Court's decision in the case just mentioned discloses that the Court referred to an earlier case of *Louisiana State Bar Association v. Connolly,* 201 La. 342, 9 So. 2d 582, 592, and stated that its holding in the *Connolly* case was to the effect that "the question whether the commission of the felony for which the attorney was convicted constitutes misconduct will be considered upon the merits of the case." In other words, the true effect of the *Steiner* decision, which at page 1084 of the officially reported opinion follows the rule of the *Connolly* case, is that the Court will consider the merits of a wilful evasion of income tax to determine whether or not in the particular instance there was gross misconduct. Furthermore, as pointed out in the *Steiner* decision, the conviction of an attorney at law of *any* felony may be grounds for disbarment of such attorney, so that the felony does not have to be one which by its inherent nature involves moral turpitude.

In a deportation proceeding neither the Immigration officials nor the courts may inquire into the merits of the particular conviction to determine whether or not in the particular case the alien was in fact guilty of moral turpitude. (*United States ex rel. Giglio v. Neelly, supra,* and cases therein cited.) The Louisiana Court decision, it is respectfully urged, has therefore no applicability to the case at bar.

The decision in *In re Hallinan* (1954), 43 Cal. 2d 243, 272 P. 2d 768, which discusses the decision of the Louisiana Court above mentioned, is attacked as not persuasive by appellee in his brief. The decision in the *Hallinan* case was cited with approval by this Court in *Twentieth Century-Fox Film Corp. v. Lardner* (C. C. A. 9, 1954), 216 F. 2d 844, 852.

It is respectfully submitted that the effect of appellee's argument is that the crime of wilful attempt to evade or defeat income tax is a crime involving moral turpitude in that fraud is a necessary element of such offense. Such a position is untenable and is directly contrary to the rule of *United States v. Scharton, supra,* and *United States v. Noveck, supra.* Analogy for the support of appellant's position is found in the case of *United States ex rel. Giglio v. Neelly, supra.* In that case the Court considered whether or not the crime of passing counterfeit coins is a crime involving moral turpitude. To sustain a conviction under the statute considered it was not necessary to prove an intent to defraud inasmuch as such intent was not an element in the statutory provision at the time involved. The Seventh Circuit held that fraud not being an essential element of the crime involved, such crime did not involve moral turpitude regardless of what the particular facts concerned in the passing of counterfeit coins might have been.

B. The Indictment Upon Which Plaintiff Was Convicted Does Not Show Moral Turpitude Within the Meaning of the Deportation Statutes.

Appellee takes the position in his brief that the allegations in the indictment involved in appellant's conviction of income tax evasion assert, in substance, that appellant filed false and fraudulent income tax returns and can be considered to determine whether the crime of which appellant was convicted involves moral turpitude. It is submitted that the authorities cited in appellant's opening brief on this point establish that appellee's position is in error.

Contrary to the position taken by appellee, appellant contends that the case of *United States ex rel. Zaffarano v. Corsi* (C. C. A. 2, 1933), 63 F. 2d 757, does establish that the indictment can be resorted to by the deporting officials and the courts considering the actions of such deporting officials only for the purpose of determining what statutory charge was involved in the conviction upon which the deportation is sought. The crime here involved is the crime of wilful attempt to evade or defeat income tax; the crime is not the wilful attempt to evade or defeat income tax by the filing of false or fraudulent income tax returns. None of the authorities cited by appellee on pages 10-12, inclusive, of his brief support appellee's position, other than the District Court decision in the case of *United States ex rel. Guarino v. Uhl* (S. D. N. Y., 1939), 27 Fed. Supp. 135, and this latter case was reversed by the Second Circuit. Appellee contends that the reversal mentioned was upon other grounds, but appellant submits

that the decision of the Second Circuit Court of Appeals reported in 107 F. 2d 399, 400, is upon the ground that matters in the indictment which are not inherent in the nature of the crime cannot be considered by the deporting officials. The District Court's decision in the *Guarino v. Uhl* case, *supra,* states at page 137 that "the criminal intent admitted by the plea related to a crime for which the burglar's tools, the jimmy, would be adapted and commonly used, burglary or larceny, as stated in the indictment. Both those crimes involve moral turpitude." However, upon appeal the Second Circuit stated that "other circumstances make it highly unlikely that this alien had possession of the jimmy for any such relatively innocent purpose; but that is quite irrelevant. The decisions cited held that the deporting officials may not consider the particular conduct for which the alien has been convicted; and indeed this is a necessary corollary of the doctrine itself." The Second Circuit held in the case just cited that the indictment was satisfied by an intent to commit any crime whatsoever no matter how morally innocent it might be and disregard the language of the indictment quoted in the decision. As appears from the District Court's decision in *Guarino v. Uhl, supra,* the indictment charged the defendant with the crime of "feloniously possessing burglar's instruments," and the District Court stated that the fact that the relator pleaded guilty to a misdemeanor "involved no change in the nature of the offense, but only in the punishment" (27 Fed. Supp. 135, 136-137).

In the case just cited there was then surplusage in the indictment which could not be considered; and in the case at bar allegations of fraudulent conduct in the indictment are mere surplusage. (*United States v. Scharton, supra.*)

II.

Appellant's Conviction for Violating Title 26, United States Code, Section 145(b), Was Not a Material Fact Which Appellant Was Under a Duty to Disclose in His Application for an Immigration Visa.

Appellee contends that even if the crime of wilful attempt to defeat or evade income tax is not a crime involving moral turpitude, appellant was nevertheless required to reveal his conviction thereof in his application for an immigration visa for the reason that such conviction was a material fact.

Appellant in his opening brief has cited authorities which establish that appellee's contention in this respect is in error. The rule is well stated in the case of *United States ex rel. Teper v. Miller* (D. C. S. D. N. Y., 1949), 87 Fed. Supp. 285, 286:

> "As to the misrepresentations made to the Consul, the law is that the facts misstated must be material to justify a refusal to issue a visa; and that a fact suppressed or misstated is not material to the alien's entry, unless it is one which, if known, would have justified a refusal to issue a visa. U. S. ex rel. Fink v. Reimer, 2 Cir., 1938, 96 F. 2d 217, U. S. ex rel. Leibowitz v. Schlotfeldt, 7 Cir., 1938, 94 F. 2d 263; cf. Daskaloff v. Zurbrick, 6 Cir., 1939, 103 F. 2d 579; U. S. ex rel. Lamp v. Corsi, 2 Cir., 1932, 61 F. 2d 964. The Consul in the instant case would have been justified in refusing to issue the visa only if the suppressed facts were sufficient to cause Teper to be excluded under Section 136(c) of Title 8, U. S. C. A. as a person who had been convicted of a crime involving moral turpitude. Hence the first ground for affirmance of exclusion by the Assistant Commissioner of the Immigration

and Naturalization Service must stand or fall with the second ground, and therefore the only material question before the Court is whether Teper was properly excluded on the ground of having been convicted of a crime involving moral turpitude."

The Board of Immigration Appeals in its Interim Decision No. 763 upon reconsideration on April 16, 1956, in the *Matter of S-C* in deportation proceedings, Docket E-086114, conceded and ruled that a misrepresentation of facts, whether wilful or innocent, made in applying for a visa will not invalidate the visa if the alien would have been eligible to secure the visa had the true facts been known; and in such decision the Board of Immigration Appeals concludes that the rule in *Iorio v. Day* (C. C. A. 2, 1929), 34 F. 2d 920, is the general rule. The Board of Immigration Appeals in the matter just cited further distinguishes the case of *United States ex rel. Jankowski v. Shaughnessy* (C. C. A. 2, 1951), 186 F. 2d 580, upon the grounds that the latter cited case would seem to involve an activity on the part of the alien prior to entry which might cause the alien to be inadmissible to the United States under the Act of October 16, 1918, or Section 3 of the Act of February 5, 1917, "making inadmissible persons who are anarchists, subversives, or believers in sabotage, etc." The decision of the Board of Immigration Appeals just mentioned was approved by the Attorney General of the United States on May 8, 1956.

Counsel for appellant has examined the briefs of counsel in the case of *United States ex rel. Jankowski v. Shaughnessy, supra*, and it appears therefrom that there had been an accusation against the alien there involved to the effect that such alien was a Communist, and the briefs point out that Jankowski was interned in England

prior to the time that Russia was at war with Germany and was released from internment after Russia entered the war; the briefs also show that the alien's family was still resident in Poland and that the alien was able to enter and leave Poland freely after the conclusion of World War II.

Appellant submits that the decision in the case of *Ablett v. Brownell* (U. S. C. A. D. C., 1956), 240 F. 2d 625, cited by appellee, is distinguishable from the case at bar. The alien was under an order of deportation in the *Ablett v. Brownell* case. He had in his application for a visa denied any convictions prior to entry into the United States, whereas he had in fact been convicted of being a landlord "wilfully a party to the continued use of (certain premises) as a brothel" as well as convicted of petty theft. The convictions were in England. The Court of Appeals for the District of Columbia held that the Consul would have been justified in refusing an immediate grant of an immigration visa to Ablett if he had disclosed the brothel conviction, as the Counsul would have had to determine whether moral turpitude was involved in the brothel case. The Court in the cited opinion stated that a final determination as to whether or not such an offense constituted moral turpitude could not have been reached immediately. However, in the case at bar, had appellant disclosed his conviction of the wilful income tax evasion the Consul could have made such determination immediately inasmuch as such crime does not involve moral turpitude. The Court of Appeals for the District of Columbia distinguishes the situation of *Ablett v. Brownell, supra,* from the case of *Iorio v. Day, supra,* and says at page 630 of the cited opinion: "The crime in Iorio, unlike that here, was not one which would immediately raise the question of whether moral

turpitude was involved." Neither the decision of *Iorio v. Day, supra,* nor the decision of *Leibowitz v. Scholtfeldt* (C. A. 7, 1938), 94 F. 2d 263, was questioned in the decision of *Ablett v. Brownell, supra,* or in the decision of *Jankowski v. Shaughnessy, supra.*

Conclusion.

In conclusion it should be pointed out that other points raised by appellee in his brief in opposition to the contentions of appellant have been already answered by the authorities cited in appellant's opening brief. It is respectfully submitted that appellant is not deportable upon either of the two grounds upon which the order of deportation is based: one, that he was not convicted of a crime involving moral turpitude prior to his last entry into the United States; and two, that he was under no obligation to admit the fact of his conviction in his application for a visa. It is further submtted that the phrase "crime involving moral turpitude" does not have a sufficiently definite meaning to afford a constitutional standard for deportation insofar as a conviction under Title 26, U. S. C., Section 145(b), 1939 Revenue Code, is concerned.

Wherefore, it is respectfully submitted that the judgment of the District Court in favor of appellee should be reversed.

Respectfully submitted,

Francis C. Whelan,

Attorney for Appellant.

No. 15,355

IN THE

United States Court of Appeals

For the Ninth Circuit

SHEET METAL CONTRACTORS ASSOCIATION OF SAN FRANCISCO, a California corporation, et al.,

Appellants,

vs.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, et al.,

Appellees.

On Appeal from Order and Judgment of District Court.

BRIEF ON BEHALF OF APPELLANTS.

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No. 15,355

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BRIEF ON BEHALF OF APPELLANTS.

JURISDICTION.

This action arose under the provisions of Section 302 subdivisions (a) and (b) of the Labor Management Relations Act, 1947, as amended (29 U.S.C. sec. 186), and jurisdiction of said action was conferred upon the Court below by the provisions of Section 302 subdivision (e) LMRA 1947 (paragraphs 1 and 2 of the complaint for injunction). (R. 5, 6.)

Plaintiffs and appellants are employers of employees employed in an industry affecting commerce

(Stipulation of Facts paragraphs 1, 2 and 3, R. 17) and defendant Local Union No. 75 is a representative of employees of plaintiffs who are employed in an industry affecting commerce. (Stipulation of Facts paragraphs 3 and 4, R. 18.)

This Court has jurisdiction to review the judgment and order in question under the provisions of Title 28 United States Code Section 1291.

STATEMENT OF THE CASE

Plaintiffs are employers engaged in the sheet metal business in the City and County of San Francisco. As such they have made and entered into a collective bargaining agreement with defendant Local Union No. 104. This agreement provides in part:

> "Section 4. When sent by the employer to supervise or perform work * * * outside the jurisdiction of the Union and within the jurisdiction of another Local Union * * * the employers shall be otherwise governed by the established working conditions of said Local Union." (Stipulation of Facts, Ex. A, R. 24.)

Defendant Local Union No. 75 and Associated Heating and Sheet Metal Contractors, Inc., made and entered into a collective bargaining agreement covering the sheet metal work performed in Marin, Sonoma, Mendocino, Lake, Napa and Solano counties (hereinafter referred to as Northern California counties.) (Stipulation of Facts Exhibit "B".) (R. 26.)

Among other provisions of said agreement is a provision for a Joint Industry Board appearing in the addenda to such union agreement (paragraph 19 subsection (a)) (R. 28), requiring each employer to contribute to the Joint Industry Board fund the sum of two and one-half cents (2½¢) an hour for each hour worked by all journeymen performing work within the jurisdiction of Local Union No. 75.

When certain of the plaintiffs that is the San Francisco Sheet Metal employers undertook to perform sheet metal work in any of the Northern California counties covered by defendant Union Local 75's jurisdiction and contract, defendant Local Union 75 demanded that plaintiffs and each of them pay the sum of two and one-half cents (2½¢) an hour into the Joint Industry Board fund, and when plaintiff employers refused to do so defendant Local Union No. 75 threatened to encourage, cause and induce the employees of plaintiffs to refrain from performing any work for them in the Northern California counties unless and until the plaintiffs and each of them paid the sum of two and one-half cents (2½¢) an hour into said Joint Industry Board fund. (Complaint paragraph II, R. 9; Stipulation of Facts paragraph 10, R. 20.)

Thereafter plaintiff employers commenced paying said sums into said Joint Industry Board fund but have notified defendant Local Union No. 75 that they are doing so solely because of the acts of defendants above set forth and have filed suit in the District Court below for an injunction under the provisions of Sec-

tion 302 (e) LMRA 1947. (Complaint, Third Cause of Action paragraph II, R. 10.) (Stipulation of Facts paragraph 10, R. 20.)

SPECIFICATION OF ERRORS.

1. The Court below erred in failing to hold that payments by appellant employers into the Joint Industry Board fund constituted payments of money or other thing of value by employers to a representative of their employees who are employed in an industry affecting commerce.

2. The Court erred in granting defendant's motion for summary judgment.

3. The Court erred in denying plaintiff's motion for summary judgment.

SUMMARY OF ARGUMENT.

The District Court below, in ruling that payments to the Joint Industry Board fund did not constitute payments to a representative of employees, relied primarily on the decision of the United States Court of Appeals for the Third Circuit in *United Marine Division v. Essex Transportation Co.,* 216 Fed. (2d) 410. That case, however, involved a welfare fund. More specifically, as stated in the first sentence of the opinion, it was a pension trust. The trust in that case therefore *complied* with the requirement of Section 302 that it be for the *sole and exclusive benefit of employees* and their families. The trust was managed

by trustees chosen half by the employer's association and half by the union, and as the Court said:

> "The terms under which they act were *carefully spelled out.*" (Emphasis supplied.)

In the *Essex* case therefore it would be impossible for the trustees to apply any of the monies in the trust for the benefit or advantage of the *union as such* without *violating* the specific terms and provisions of the trust. In the present case, however, the purposes of the Joint Industry Board and the uses to which its fund may be applied are so broad and vague *that without violating* the so-called "trust agreement", the monies in the fund could be applied to a variety of purposes which the union as such desires or which are to the advantage or benefit of the *union as such.*

Secondly, the union has such a degree of control over the so-called trustees that the Joint Industry Board fund is in fact jointly controlled by the union and by the employer association and not by the so-called trustees.

Thirdly. To the extent that the *Joint Industry Board has taken over some of the functions of the union,* such as settling disputes, arbitrating and administering an apprenticeship program, the Joint Industry Board funds are used to *defray part of the expenses of the union.*

The Court below itself recognized the distinction between this "trust" and the *Essex* trust, saying:

> "The distinction between the *Essex* case and the case at bar is the fact that in the Essex case the

> fund in question was a *welfare fund,* whereas in the instant case the fund does not include the welfare and pension funds and is *subject to expenditure on purposes of a rather large and vague nature.*" (Emphasis supplied.)

To summarize: Appellants contend that the very *broad scope* of purposes and activities the Joint Industry Board together with the *degree* of *control* exerted by the union over half of the trustees is sufficient to constitute the employer contributions payments of monies or other thing of value to a representative of their employees.

In answer to the argument that the Joint Industry Board funds may conceivably be used to defray general union expenses, the Court below quoted a statement from the opinion in *Upholsterers International Union v. Leathercraft Furniture Co.,* 82 Fed. Supp. 570, as follows:

> "Whenever the trustees use or attempt to use, directly or indirectly, the fund for a purpose other than for the sole and exclusive benefit of the employee members, this court when called upon will enjoin the trustees from making the improper expenditures. The burdening of the fund with undue administrative expenses or lush salaries for union officials will not be tolerated."

This statement overlooks two facts. First, the fund in the *Upholsterers* case was obviously for the *sole and exclusive benefit of employee members* (see above) and therefore no part of this fund could be diverted to the benefit or advantage of the union as such *with-*

out violating the trust agreement itself. In this case, as stated above, the Joint Industry Board agreement is so broad and vague that there are many applications of the fund which can be made *without violating the trust* which will result in a distinct benefit or advantage to the union as such including payment of part of its operating expenses.

Second. Plaintiffs and appellants, not being parties to the agreement with Local No. 75, or represented on the Joint Industry Board, would have no means of knowing of any misapplication of Joint Industry Board funds.

Finally, it is submitted that in enacting Section 302 LMRA 1947 the Congress did not intend merely to prohibit bribes and extortions or undue administrative expenses or lush salaries for union officials but intended to forbid *all payments of any kind to representatives of employees* however laudable their purpose might be, however carefully administered and audited, excepting only payments into trusts jointly administered by such representatives and by employers *for the sole and exclusive benefit of the employees themselves* and their families.

As was said by the Supreme Court in the *Ryan* case (*U. S. v. Ryan,* 100 L. Ed 272):

> "As the statute reads, it appears to be a criminal provision *malum prohibitum which outlaws all payments,* with stated exceptions, between employer and representative." (Emphasis supplied.)

ARGUMENT.

PURPOSE OF THE LEGISLATION.

A study of the Legislative History of the Act will serve to clarify the intent and purpose of Section 302. The Legislative History shows that certain members of Congress were deeply concerned over the growth and spread of so-called "welfare funds" for broad and vague purposes and offered the legislation embodied in Section 302 for the specific purpose of *forbidding* any payments into any funds wholly or partially controlled by unions except funds for the exclusive benefit of employees with their benefits clearly specified.

A supplement to Senate Report on Senate Bill 1126, signed by Robert A. Taft, Joseph H. Ball, Forrest C. Donnell and W. E. Jenner, appears at page 458 of Legislative History LMRA 1947 and reads in part as follows:

> "An amendment reinserting in the bill a provision regarding so-called welfare funds similar to the section in the Case Bill approved by the Senate at the last session. It does not prohibit welfare funds but merely requires that, if agreed upon, such funds be jointly administered—be, in fact, trust funds for the employees, with definite benefits specified, to which employees are clearly entitled, and to obtain which they have a clear legal remedy. The amendment proceeds on the theory that union leaders should not be permitted, without reference to the employees, to divert funds paid by the company, in consideration of the services of employees, to the union treasury

or the union officers, except under the process of strict accountability."

* * * * * * *

"The necessity for the amendment was made clear by the demand made last year on the part of the United Mine Workers that a tax of 10 cents a ton on coal be paid to the Mine Workers Union *for indiscriminate use for so-called welfare purposes.* It seemed essential to the Senate at that time, and today, that if any such huge sums were to be paid, representing as they do the value of the services of the union members, which could otherwise be paid to the union members in wages, the use of such funds be strictly safeguarded." (Emplasis supplied.)

In the consideration of this measure by the Senate, Senator Taft took the floor and expressed himself as follows (Leg. His. LMRA 1947, p. 1310 to p. 1313):

"Mr. Taft. Mr. President, the amendment was explained yesterday by the Senator from Minnesota (Mr. Ball) and the Senator from Virginia (Mr. Byrd). It is substantially the same as the amendment which was adopted by the Senate last year as part of the so-called Case bill, which amendment was offered by the Senator from Virginia. The occasion of the amendment was the demand made by the United Mine Workers of America that a tax of 10 cents a ton be levied on all coal mined, and that the tax so levied be paid into a general welfare fund to be administered by the union for *practically any purpose the union considered to come within the term 'welfare'.* Of course, the result of such a proceeding, if there is no restriction, is to build up a

tremendous fund in the hands of the officers of the labor union, to be distributed for welfare, which they may use indiscriminately. *There is no specific provision with respect to it. They may distribute it to members of the union whom they like or they consider proper charity cases, and they may refuse to distribute it to other members whom they do not like.* (Emphasis supplied.)

"The demand originally made by Mr. Lewis was so broad that practically the fund became a war chest, if you please, for the union. The money for welfare funds is deducted from the wages of the employees. It is money earned by the employees, and certainly *there should be some restriction* on the right of those who bargain collectively for the employees of any company, *as to how far they can take the money earned by the employees and use it for union purposes without restriction.* Obviously, the man who is bargaining should have no right to obtain any personal advantage." (Emphasis supplied.)

Later Mr. Taft said as follows (Leg. His. LMRA 1947, p. 1311):

"Provision No. (5) at the bottom of page 2 and the top of page 3 of the amendment deals with the question of welfare fund. It provides that the payments must be made, in the first place, as found in line 25 on page 2, 'to a trust fund established by such representative'—that is by the union—'for the sole and exclusive benefit of the employees of such employer, and their families and dependents, or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents.'

"In other words, this must be a trust fund. *It cannot be the property of the union* without a definite statement *that it is in trust for the employees, who, after all have earned the money.*" (Emphasis supplied.)

Thereafter, as an example of what the legislation was designed to correct Mr. Taft referred to the coal miners' fund as follows (Leg. Hist. LMRA 1947, p. 1312):

"What was actually done by the Government when it agreed with Mr. Lewis? This is the agreement with respect to the United Mine Workers' fund:

'There is hereby provided a health and welfare program in broad outline—and it is recognized that many important details remain to be filled in—such program to consist of three parts, as follows:

'(a) A welfare and retirement fund: A welfare and retirement fund is hereby created and there shall be paid into said fund by the operating managers 5 cents per ton on each ton of coal produced for use or for sale. This fund shall be managed by three trustees, one appointed by the Coal Mines Administrator, one appointed by the president of the United Mine Workers, and the third chosen by the other two.'

"In this case the Government is the employer.

'The fund shall be used for making payments to miners, and their dependents and survivors, with respect to (1) wage loss not otherwise compensated at all or adequately under the provisions of Federal or State law and resulting from sickness (temporary disability), permanent disability, death or retirement, and (2) *other related welfare purposes, as determined by the trustees.* Subject to the stated purposes of the fund, the trustees shall have full authority with respect to questions of coverage and eligibility, priorities among classes of benefits, methods of providing or arranging for provision of benefits, and all related matters.' (Emphasis supplied.)

"This represents money earned by the employees, in the form of a tax of 5 cents a ton, which

is turned into a fund, *and two private persons, without restraint, have almost unlimited authority to determine how the money shall be spent.* Whether the words *'other related welfare purposes'* make it unnecessary to furnish a definite statement, as required by this amendment, is a question. It is left entirely in the choice of two men, who do not have particularly at heart the interests of the public, to determine the terms under which the money shall be distributed.

"The purpose of the amendment is to require that the fund shall be established in definite, detailed form, in the form of a trust fund, with respect to which the employees can determine their rights and can insist upon them." (Emphasis supplied.)

It is thus clear from the above passages from the Legislative History that the Congress in enacting Section 302 intended to forbid payments by employers into funds even though jointly controlled by employers and representatives of their employees where the funds were managed by two private persons (or groups of persons) who had "almost unlimited authority to determine how the money should be spent."

LEGISLATIVE PRINCIPLES APPLIED TO JOINT INDUSTRY BOARD.

The so-called Joint Industry Board Fund here involved is exactly the type of fund Congress intended to prohibit by Section 302 for the following reasons:

There is, in fact, no trust.

There are no beneficiaries except the union and the employer association. The purposes of the fund are so broad and vague the monies can be used for *any purpose representatives of both sides agree upon.*

Finally the purposes specified include the expenditure of assets of the fund for the purpose of *defraying the cost of at least some activities normally carried on by the union.* This constitutes a "thing of benefit" to the union.

NO TRUST WAS CREATED.

Although the document creating the Joint Industry Board is headed "Trust Agreement", it is notworthy that no trustees are named, created or appointed.

A Joint Industry Board is created, and one of the functions of the Joint Board is to "supervise, administer and carry out all funds provided for by the Bargaining Agreement." (Stipulation of Facts, Ex. C, paragraph A(1), R. 30.)

This, however, does not constitute the members of the board trustees. On the contrary, the power reserved to the union and the association to remove and replace their representatives on the Joint Industry Board constituted by the board members *mere servants or agents.*

The Joint Industry Board agreement provides:

> "B—3. *The designation of any representative may be revoked at any time at the pleasure of the*

party making the appointment. Any vacancy on the Board, caused by death, resignation, or revocation of the designation shall be filled by the Union or Employers, respectively, as the case may be. Notice of any new designation is to be given in writing to the Secretary of the Board." (R. 32.) (Emphasis supplied.)

"E—*Absentees:* If for any reason a member of the Joint Industry Board cannot be present at a meeting, the Union and the Employer Groups, respectfully, shall have the power and authority to appoint another person automatically to act as an alternate and take the place of the absent Board member at a meeting or meetings. This person shall sit at these meetings as a member of the Board, with full power to vote and act upon all questions and resolutions that shall come up at that meeting or meetings in which the said alternate shall sit for the absent Board member." (R. 33.)

The question whether persons designated trustees are actually trustees or merely *agents or servants who hold legal title to property for the convenience of their principals* has frequently been considered in cases involving Massachusetts trusts. A fair statement of the law my be found in *Goldwater v. Altman,* 210 Cal. 408 at 416, as follows:

"Generally stated, a trust of this nature is created wherever several persons transfer the legal title in property to trustees, with complete power of management in such trustees free from the control of the creators of the trust, and the trustees in their discretion pay over the profits of

the enterprise to the creators of the trust or their successors in interest. As thus defined it is apparent that such a trust is created by the act of the parties and does not depend on statutory law for its validity. In the case of *Hecht v. Malley,* 265 U. S. 144, 146 (68 L. Ed. 949, 44 Sup. Ct. Rep. 462, 463), Mr. Justice Sanford referred to such organizations as follows:

'The "Massachusetts trust" is a form of business organization, common in that state, consisting essentially of an arrangement whereby property is conveyed to trustees, in accordance with the terms of an instrument of trust, to be held and managed for the benefit of such persons as may from time to time be the holders of transferable certificates issued by the trustees showing the shares into which the beneficial interest in the property is divided. These certificates, which resemble certificates for shares of stock in a corporation and are issued and transferred in like manner, entitle the holders to share ratably in the income of the property, and, upon termination of the trust, in the proceeds.

'Under the Massachusetts decisions these trust instruments are held to create either pure trusts or partnerships, according to the way in which the trustees are to conduct the affairs committed to their charge. *If they are the principals and are free from the control of the certificate holders in the management of the property, a trust is created; but if the certificate holders are associated together in the control of the property as principals and the trustees are merely their managing agents, a part-*

nership relation between the certificate holders is created.'

"The leading case in Massachusetts where this so-called control test is fully discussed is *Williams v. Inhabitants of Milton,* 215 Mass. 1 (102 N.E. 355). In that case the question involved was whether the Boston Personal Property Trust was to be taxed as a partnership or as a trust. The court, after discussing certain cases holding the particular trust therein involved created a partnership, and others where it had been held that a trust had been created, stated (102 N.E. 357) that the distinction 'lies in the fact that in the former cases the certificate holders are associated together by the terms of a "trust", and are the principals *whose instructions are to be obeyed by their agent who, for their convenience, holds the legal title to their property, the property is their property, they are the masters;* while in *Mayo v. Moritz* (151 Mass. 481 24 N.E. 1083), where it was held the instrument created a trust), on the other hand, there is no association between the certificate holders, the property is the property of the trustees and the trustees are the masters. All that the certificate holders in *Mayo v. Moritz* had was a right to have the property managed by the trustees for their benefit. They had no right to manage it themselves nor to instruct the trustees how to manage it for them.' " (Emphasis supplied.)

(See also *Bernesen v. Fish,* 135 Cal. App. 588.)

It cannot be doubted that the so-called "trustees" of the Joint Industry Board fund were under the absolute control of their principals. Either they carried out the directions of their principals or they were

removed and replaced by someone who would follow orders. The Joint Industry Board agreement was intentionally drawn to so provide.

In legal effect, therefore, the payments into the Joint Industry Board fund were exactly the same as payments into a *joint bank account* in the names of the union and the association. It is true that monies could not be withdrawn or expended from such fund except upon the consent and signature of both parties but it is obvious that when the employers vested the union with a one-half interest in and one-half control over such fund they *conferred upon or paid to the union representing their employees a "thing of value"* contrary to the statute.

BENEFICIAL INTEREST IN THE UNION.

Who were the beneficiaries of the trust? Who "owned the money" in the fund?

There were no beneficiaries of the Joint Industry Board fund except the *union itself* and the *employer association.* Certainly *there were no employee beneficiaries who could take legal action to enforce their rights such as there were in the Essex case* and such as there are in the case of every pension or medical and hospital trust. Consequently, the only parties who had any voice or legal rights in saying how the monies were to be expended were the union and the employer association. They were, in effect, *trustees for themselves.*

Section 302 was intended to prohibit just this kind of trust. The Legislative History of the Labor Management Relations Act 1947 shows at page 1302 that Senator Ball offered Section 302 as an amendment to the Taft-Hartley Act. Senator Ball said (p. 1304):

> "All that it requires is that the so-called welfare fund shall be jointly administered by representatives of the employer and the union; that the specific purposes of the fund and the benefits to which employees are entitled shall be set forth in detail in the agreement creating the fund and that it shall be in the nature of a trust fund *so that employees receiving benefits from it will have a right to go into court to protect their interest in such benefits if necessary.*" (Emphasis supplied.)

In the consideration of this measure by the Senate, Senator Taft took the floor and expressed himself as follows (p. 1311):

> "So that the purpose of the provision is that the welfare fund shall be a perfectly definite fund, that its purposes shall be stated *so that each employee can know what he is entitled to, and go to court and enforce his rights in the fund, and that it shall not be, therefore in the sole discretion of the union or the union leaders and useable for any purpose which they may think is to the advantage of the union or the employee.*" (Emphasis supplied.)

The trust in the *Essex* case, which the Court below relied on met this requirement. That case involved a pension trust for the sole and exclusive benefit of em-

ployees and their families. The employees, as beneficiaries, *could have gone to a Court of equity* to *enforce their rights* and prevent a diversion of the trust fund to the union. *Such is not the case here.* In this case there are no employee beneficiaries who have any rights which could assert in any Court. The *only* parties who had any voice or legal rights to say how the monies were to be expended were the union and the employer association. As stated above, the union and the employer association, the so-called trustors, were *themselves* the sole and exclusive beneficiaries of the Joint Industry Board fund.

The fund was to be expended for purposes *they* thought proper. In fact they could *change the purposes of the trust at will* with no one to gainsay them.

To illustrate the dual relationship of the parties as trustees and as beneficiaries we point out that the so-called trust agreement provides:

> "It shall be the functions of the Joint Board * * *
>
> "5. To *assist and aid the heating and sheet metal industry* in continuing the high degree of skill which it now enjoys; to provide a forum where management and labor can discuss ways and means for further cooperation; * * *" (Emphasis supplied.)

This unquestionably refers to Local Union No. 75 and to the employer association as the "industry" and as "management and labor." In other words, they proposed to "assist and aid" themselves.

When these parties further empowered the Joint Board

> "To counsel and advise and render such other assistance to individual members of the union and all employers who are signatory hereto which will aid and facilitate efforts to effectuate high standards in the industry"

they conferred upon the board power to expend the monies of the fund for any purposes which *they* considered would effectuate high standards in the industry.

Furthermore, when the parties declared it to be a function of the board (paragraph 6)

> "To foster, promote and urge beneficial legislation within the State of California * * *"

they contemplated legislation which the union itself agreed to endorse. Unless the union approved it, there would be no majority vote of trustees and the legislation would not be supported.

To sum up: There was *no one* to challenge whatever disposition might be made of the monies in the fund.

Certainly an individual employer, having irrevocably parted with his contributions to the fund would not waste his time by insisting through legal action that the funds be applied for one purpose rather than another, and as stated previously, no employee had any rights in this fund which he could take to Court to enforce.

Fairly read, we do not believe that Congress considered this remote possibility to be an adequate safe-

guard against misuse of funds of this character as suggested by the Court below. Rather it simply forbade them altogether.

JOINT CONTROL BY EMPLOYERS DOES NOT RENDER "TRUST" VALID.

The Court below said:

> "A fair reading of the Trust Agreement of Joint Industry Board which governs the relationship of the parties thereto leads to the conclusion that the power to expend the funds contributed by the employers, resides in the Board, and is thus dependent upon the approval of the employer members."

The Labor Management Relations Act 1947 recognies many situations where employers by reason of superior economic force exerted upon them by unions are *forced* to commit acts contrary to the policy declared by Congress and to the provisions of the statute. A common illustration is that of the employer being forced to sign a union-shop agreement due to economic pressure from a union which does not in fact represent a majority of his employees. Any discrimination by the employer against his employees resulting from superior economic pressure by a union is likewise declared unlawful. In other words, *even though the employers have agreed to it,* the statute declares it unlawful. Such is the situation here. In this case it can hardly be contemplated that the employers *originated* the idea of turning the money over

to the board or volunteered to do so. Rather the so-called "agreement" was obtained by superior economic force. This does not excuse the employers. The "agreement" by the employers does not make it legal. Here is where the statute comes in. The statute was intended to apply to situations where the employer "agreed" to certain things under superior economic force. It has provided a *legal* remedy where economic strength alone is not sufficient to stave off the demand for illegal payments. This is shown by the debate on the floor of the Senate where Mr. Taft said (Leg. Hist. p. 1313):

> "* * * Unless there are some restrictions, *if such an agreement is forced upon an employer,* in effect we make the officials of the union who collect the tax government agents for collecting and distributing the tax. Under the proposed agreement originally demanded by Mr. Lewis *he could distribute the fund for the benefit of schools or he could operate anything he wished to operate in the nature of local government.* The whole thing would become a great weapon of power as it was in the case of Mr. Petrillo to dominate the union and to please the members whom he wanted to please and punish members whom he did not wish to please or who refused to go along with the policy of the union." (Emphasis supplied.)

The above quotation points up two things: First, the statute *forbids* the payments in question even though some employers have "agreed" to it. Secondly, even though the purposes may be *laudable,* as for example the establishment of schools, it was the avowed purpose of the legislation to forbid the establishment

of, or the payment into, any trust fund solely or jointly controlled by unions *except funds established for the sole and exclusive benefit of the employees themselves.*

Many examples may be given of objects and activities of the Joint Industry Board which are perfectly legitimate and which would be entirely legal *but for the prohibitions of Section 302.*

Suppose that the union desired to embark on an advertising campaign "to acquaint the public at large with the work of the Heating and Sheet Metal Industry and to foster good public relations." (Trust Agreement A (6).) By extolling the virtues of the Heating and Sheet Metal Industry presumably the public would be persuaded to purchase and to use more sheet metal products. As a result more sheet metal workers would be employed.

Yet if the union said to the employers, "You turn the money over to us and we will run the campaign", this would obviously involve a direct violation of Section 302. It would be a payment by employers to a representative of their employees for a purpose not permitted by the statute.

Instead, however, in this case the union says, "You put the money in a joint account in both our names and we will *jointly* decide how to spend it." It is submitted that such arrangement is also a violation of the statute.

However desirable or profitable or beneficial such a program might be, Section 302 declares that an

employer cannot vest a union with the control or disposition of funds in whole or in part *except for the sole and exclusive benefit of employees.*

The "Trust Agreement" (A (6)) declares as one of its purposes and objects "to foster, promote and urge beneficial legislation within the State of California".

There is hardly any limit to the purposes for which the monies in the fund could be used under this provision. For example: a campaign could be waged to make it compulsory to have an air conditioning system in every public building, thus increasing the use of sheet metal products. This would give more employment to union members. Again, *assuming* that the legislation will in fact be beneficial to the employees represented by the union, Section 302 does not permit payments by employers into a fund to be jointly administered by the employers and the union *except* for the *sole and exclusive* benefit of the employees.

PART OF UNION OPERATING EXPENSES PAID BY FUND.

There is a more subtle but nevertheless clearly recognizable payment of a "thing of value" to the union by the assumption and performance of certain functions by the Joint Industry Board.

It is the function of a union not only to negotiate collective bargaining contracts but *to administer and enforce them.*

The Labor Management Relations Act itself defines collective bargaining as follows (Section 8 (d).):

> For the purposes of this section, *to bargain collectively* is the performance of the mutual obligation of the employer and the representative of the employees to *meet at reasonable times and confer in* good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or *any question arising thereunder.*" (Emphasis supplied.)

Thus the handling of grievances and disputes under a contract is included within the statutory definition of collective bargaining.

Heretofore the union has handled all disputes and grievances arising out of the contract *at its own expense,* including arbitration. This function is now *transferred* to the Joint Industry Board composed of an equal number of representatives of the employers and the union.

The Joint Industry Board Agreement provides:

> "A—Purposes:
>
> "It shall be the functions of the Joint Board:
>
> * * * * * * *
>
> "2—To aid in the settlement of any and all disputes of any nature whatsoever which may arise between the Union, its members, agents and/or representatives, and the above-named association, its members, and all other employers of union members who are signatories to agreements with the union.
>
> "3—To set up and administer a joint arbitration committee and to provide further arbitration pro-

> cedures should the Joint Arbitration Committee be unable to decide or resolve a dispute." (R. p. 30.)

All of the costs of the operation of the board are paid out of the 2½¢ per hour contributions of the employers. The Joint Industry Board agreement provides:

> "F—EXPENSES:
>
> The Board shall have the authority to provide for the payment of expenses for attending Board or Committee meetings or for other expenses incurred in connection with Joint Industry Board business." (R. 32.)

Thus, by paying the entire cost of "settlement of any and all disputes" * * * and the cost of arbitration the employers are thereby *paying the cost of a portion of the functions normally paid for by the union.* The employers have in this manner paid a "thing of value" to the union just as surely as if they had paid the *rent for the union hall and offices* or a part of the salaries of their officers.

CONCLUSION.

The Supreme Court has declared in the *Ryan* case (*U. S. v. Ryan*) (supra) that the statute should not be strictly construed but should be *liberally* construed *to effectuate its purpose.* We quote from the opinion as follows:

"Further, a *narrow reading* of the term 'representative' would *substantially defeat the congressional purpose.*" (Emphasis supplied.)

* * * * * * *

"As the statute reads, it appears to be a criminal provision, *malum prohibitum,* which outlaws all payments with stated exceptions, between employer and representative." (LRR Vol. 37, No. 33, p. 4.)

The language of the Supreme Court is certainly broad enough to condemn vesting a union with a one-half ownership and one-half control over a fund made up of employer contributions where the fund is to be used for purposes jointly agreed upon by the union and the employers which are not purposes specified and permitted by Section 302.

The decision in this case should be governed not by form but by substance.

Appellants contend that under the statute and under the *Ryan* decision it is not necessary to a violation of Section 302 that any money be paid *directly to a union.* If this were so, payment of the union's rent to the union's landlord by the employer would be an easy evasion. Likewise, even though the money is not paid *directly to a union,* if it is paid into a fund, a trust or a bank account over which the union has in effect a general power of appointment or the right to designate how the money shall be spent, such payment constitutes the payment of a "thing of value" to the union in violation of Section 302.

In this case, however, in truth and in fact the union and the employer *jointly own and jointly control the Joint Industry Board* fund and can use the monies *for any purpose they choose.* The so-called trustees are mere agents who carry out the orders of their principals on pain of removal and replacement.

By thus vesting the union with joint ownership and control of the Joint Industry Board fund this constitutes the payment by employers to a "representative of their employees of a thing of value" in violation of Section 302. LMRA 1947.

Dated, San Francisco, California,
February 11, 1957.

ROTH AND BAHRS,
By GEORGE O. BAHRS,
Attorneys for Appellants.

No. 15,355

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SHEET METAL CONTRACTORS ASSOCIATION OF SAN FRANCISCO, a Corporation, *et al.*,

Appellants,

vs.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, *et al.*,

Appellees.

On Appeal From the United States District Court for the Northern District of California, Southern Division.

BRIEF ON BEHALF OF APPELLEES.

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BRIEF ON BEHALF OF APPELLEES.

Statement of the Case.

This case arises upon appeal [R. 50] "from the summary judgment denying an injunction entered in this action on September 27, 1956" by the United States District Court for the Northern District of California, Southern Division [R. 48-50], which is a final decision reviewable by this Honorable Court of Appeals under the provisions of 28 U. S. C. §1291.

Since, in our opinion, Appellants' statement of the case in its opening brief (pp. 1-4) does not completely nor in all respects accurately summarize the undisputed facts

disclosed by the record herein, and the argument set forth in Appellants' brief seeks to rely upon certain matters outside the record, Appellees herewith respectfully submit this further statement of the case for the consideration of the Court. (See Rule 18, subd. 3.)

A. The Parties to the Case.

Plaintiffs and appellants consist of:

(1) *Sheet Metal Contractors Association of San Francisco,* agent and representative of plaintiff employers for purposes of collective bargaining with defendant Local Union No. 104 [Stipulation of Facts, Par. 2, R. 17], and;

(2) *28 San Francisco sheet metal contractors* who are and for several years have been members of said plaintiff association and parties to collective bargaining agreements with defendant Local 104. [Stipulation of Facts, Pars. 2 and 3, R. 17-18.]

With respect to these 28 alleged California corporations, co-partnerships, and individually-owned sheet metal contracting firms [see Complaint, Par. III, R. 6-7; Cf. Answer, Pars. III and IV, R. 12] constituting the plaintiff employers, it should also be noted that during the period here material *only eight* of them have carried on jobs in the Northern California Counties of Marin, Sonoma, Mendocino, Lake, Napa and Solano and made the questioned payments into the "Joint Industry Board Fund of the Heating and Sheet Metal Industry" of said Northern California Counties. [Stipulation of Facts, Pars. 9 and 11, R. 19-21; compare the Complaint, Third Cause of

Action, Par. II, R. 10.] These 8 directly-interested plaintiff contractors are:

(1) *Ace Sheet Metal Works* (Lloyd Hannan, Individual Owner)

(2) *Apex Sheet Metal Works* (Edwin Stevens, Individual Owner)

(3) *Gilmore Air Conditioning Service* (a California Corporation)

(4) *Western Heating & Plumbing Co., Inc.* (a California Corporation)

(5) *Atlas Heating & Ventilating Co., Ltd.* (a California Corporation)

(6) *Scott Co* (a Co-partnership consisting of W. W. Cockins, John L. McCabe and J. J. Nicholson)

(7) *Valley Sheet Metal Co.* (a Co-partnership consisting of Chas. F. Andrews and Edward E. Salomone)

(8) *Otis Sheet Metal Co., Inc.* (a California Corporation)

Defendants and Appellees consist of:

(1) *Sheet Metal Workers International Association;*

(2) *Local Union No. 104* of said International labor union, which maintains its principal offices in San Francisco, California, and is the collective bargaining representative of the journeyman sheet metal workers and apprentices employed by the plaintiff San Francisco sheet metal contractors. [Stipulation of Facts, Par. 2, R. 17; see also Complaint, R. 8 and Answer, R. 13.]

(3) *Local Union No. 75* of said International labor union, which maintains its principal offices in Vallejo, California, and is the collective bargaining representative of the journeymen sheet metal workers and apprentices employed by the Northern California Sheet Metal Contractors, doing business in the Counties of Marin, Sonoma, Lake, Napa and Solano and belonging to the Associated Heating and Sheet Metal Contractors, Inc., who are *not* parties to this action. [Stipulation of Facts, Pars. 4 and 6, R. 18-19; see also Complaint, R. 8, and Answer, R. 13].

(4) *Joint Industry Board of the Heating and Sheet Metal Industry of Marin, Sonoma, Mendocino, Lake, Napa and Solano Counties,* a joint trusteeship located at Vallejo, California, which was organized and established on or about June 10, 1955, pursuant to a written trust agreement as provided by a collective bargaining agreement between defendant Local 75 and the Associated Heating and Sheet Metal Contractors, Inc., representing the Northern California sheet metal contractors. [Stipulation of Facts, Pars. 4, 6, 7, and 8, R. 18-19; and Exs. "B" and "C" thereto, R. 26-41; see also Complaint, R. 8, and Answer, R. 13.]

(5) *W. R. White,* business representative of defendant Local 75. [Complaint, R. 9, and Answer, R. 13.]

B. The San Francisco Sheet Metal Contractors' Agreement With Local 104.

Under the terms of the valid standard form of collective bargaining contract executed on or about July 1, 1955, between the plaintiff Sheet Metal Contractors Association of San Francisco, acting on behalf of and as the agent of plaintiff employers, and defendant Local 104 [Stipula-

tion of Facts, Par. 3, R. 17-18; and Ex. "A" thereto, R. 21-25] plaintiff employers have agreed that—

> "[J]ourneymen sheet metal workers hired outside of the territorial jurisdiction of the Union to perform or supervise work outside the jurisdiction of the Union and within the jurisdiction of another Local Union affiliated with the Sheet Metal Workers International Association, shall receive the *wage scales and working conditions of the Local Union in whose jurisdiction such work is performed or supervised.*" (Art. VII, Sec. 3); and
>
> "When sent by the Employer to supervise or perform work . . . outside the jurisdiction of the Union and within the jurisdiction of another Local Union affiliated with Sheet Metal Workers International Association, journeymen sheet metal workers covered by this Agreement shall be paid . . . in no case less than *the established wage scale of the Local Union in whose jurisdiction they are employed* . . . *and* the Employers shall be otherwise governed by *the established working conditions of said Local Union.* . . . " (Art. VII, Sec. 4.) [R. 23-24; emphasis added.]

C. The Joint Industry Board Fund for Other Northern California Counties.

Pursuant to a valid collective bargaining agreement executed on or about June 10, 1955, between various employers, *other than plaintiffs,* doing business as sheet metal contractors in the Counties of Marin, Sonoma, Mendocino, Lake, Napa and Solano, California, represented by the Associated Heating and Sheet Metal Contractors, Inc., and defendant Local No. 75 [Stipulation of Facts, Par. 4, R. 18; and Ex. "B" thereto, R. 26-29] there has been

created the "Joint Industry Board," defendant herein, *composed of an equal number of employer and union trustees,* who function pursuant to a formal "trust agreement." [Stipulation of Facts, Pars. 6-8, incl., R. 18-19; and Ex. "C" thereto, [R. 29-41.]

The purposes and functions of this Joint Trusteeship as specified in the trust instrument are—

(1) "To *supervise, administer and carry out all funds* provided for by the Bargaining Agreements except the Health & Welfare Fund. . . ."

(2) "To aid in the *settlement of any and all disputes* of any nature" between "the Union, its members, agents and/or representatives" and the Employers' Association, its members, and all other signatory employers.

(3) "To set up and administer a *joint arbitration committee* and to provide *further arbitration procedures.* . . ."

(4) "To supervise and administer a *joint apprenticeship program.* . . ."

(5) "To *assist and aid the Heating and Sheet Metal Industry in continuing the high degree of skill it now enjoys";* to provide a *forum for Management-Labor discussion* and cooperation; to *effectuate high standards in the Industry,* etc.

(6) To *meet with representatives of public, quasi-public and allied private bodies or groups; "promote beneficial legislation";* and to *"foster good public relations,"* etc. . . . [Restraints of trade and political activities are expressly prohibited.] [R. 30-31; emphasis added. See also Mem. Op. of Dist. Ct., R. 43-44.]

These lawful, mutually beneficial and obviously socially desirable activities of the Joint Industry Board (see *Bay Area Painters Joint Committee v. Orack* (1951), 102 Cal. App. 2d 81, 226 P. 2d 644) are financed by the employers' monetary payments into the trust fund of 2½¢ for each hour worked by each employee covered by the Bargaining Agreement, pursuant to Section 19-A of the contract and Section Q of the trust agreement. [Stipulation of Facts, Par. 10, R. 20; and Exs. "B" and "C" thereto at R. 28 and R. 40-41 respectively.]

D. The Questioned Payments by 8 San Francisco Contractors to the Trust Fund of the Joint Industry Board of the Heating and Sheet Metal Industry of Marin, Sonoma, Mendocino, Lake, Napa and Solano Counties.

Between July 1, 1955, and June 22, 1956, eight of the plaintiff employers (*Ace; Apex; Gilmore; Western Plumbing; Atlas; Scott; Valley Sheet Metal, and Otis*) "have carried on jobs" in the above named six counties, "employing on such jobs sheet metal workers who were members of defendant Local No. 104." [Stipulation of Facts, Par. 9, R. 19-20.]

By its June 10, 1955, collective bargaining agreement [Stipulation, Ex. "B"; R. 26-29] defendant Local 75, a sister local affiliated with the defendant Sheet Metal Workers International Association, had previously established wage scales and working conditions in said six counties which these 8 San Francisco contractors agreed to observe under the terms of their July 1, 1955, contract with

the representative of their employees, Local 104, as pointed out above. [Stipulation, Ex. "A," Art. VII, R. 23-24.]

Between October 13 and December 15, 1955, defendant Local No. 75 "threatened to encourage, cause and induce the employees" of these 8 San Francisco contractors performing jobs in the six-county area to quit work, unless said contractors observed the locally established employment conditions by contributing to the Joint Industry Board Fund the sum of 2½¢ for each hour worked in said Counties. Thereafter, said 8 San Francisco contractors complied with Local 75's demand for such contributions to the joint trust fund and have continued to do so. [Stipulation of Facts, Pars. 10-11, R. 20-21.]

E. The Proceedings in the District Court.

On January 19, 1956, the San Francisco Sheet Metal Contractors Association and numerous individuals, partnerships and corporations constituting 28 sheet metal contracting companies belonging to that employers' association, plaintiffs and appellants herein, filed the instant complaint with the District Court [R. 3-11] seeking an injunction against *all* defendants and appellees *"under the provisions of Section 302, subdivisions (a) and (b)* of the *Labor Management Relations Act 1947 as amended (29 U. S. C. Section 186)."* [Complaint, Par. I, R. 5.]

By such complaint, said plaintiffs sought to invoke the jurisdiction conferred upon said Honorable United States District Court by *Section 302(e) of the Taft-Hartley Act,*

29 U. S. C. §186(e), [Complaint, Par. II, R. 6], to obtain a judgment and decree—

> (1) enjoining and restraining "defendants and each of them" from "causing or attempting to cause plaintiffs or any of them to pay any money or thing of value to defendants JOINT INDUSTRY BOARD and/or LOCAL UNION NO. 75";
>
> (2) enjoining and restraining "defendants JOINT INDUSTRY BOARD and LOCAL UNION NO. 75 and each of them" from "receiving or accepting any money or thing of value from plaintiffs";
>
> (3) ordering and directing the "defendant JOINT INDUSTRY BOARD" to "repay and return all monies or things of value paid or delivered to defendants by plaintiffs or received and accepted from plaintiffs." [Complaint, Prayer, R. 11.]

On April 12, 1956, defendants duly filed their *"Answer to Complaint"* herein. [R. 11-15.] Thereafter, on June 22, 1956, all parties entered into a *"Stipulation of Facts"* [R. 16-21] for the purpose of enabling the District Court to pass upon plaintiffs' and defendants' respective motions for summary judgment. [R. 42 and R. 15-16.]

The legal issues thus placed before the District Court for decision by the above-mentioned pleadings and stipulated facts may be briefly summarized as follows:

1. Were any of the plaintiffs an *"employer" of "employees who are employed in an industry affecting commerce"* within the meaning of Section 302 of the Taft-Hartley Act?

2. In the case of any such plaintiff employer, were any of the defendants a *"representative of any of his*

employees" within the meaning of Section 302 of the Taft-Hartley Act?

3. Had any such defendant "representative" of any employees of any such plaintiff employer violated or attempted to violate Section 302 of the Taft-Hartley Act which makes it "unlawful for any *employer* to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any *representative of any of his employees*" and "for any *representative of any employees* . . . to receive or accept or to agree to receive or accept from the *employer of such employees* any money or other thing of value"?

Declaring that, under the circumstances of this case, it "cannot hold that the payments in question are payments 'to any representative' " and further that the "union members of the Joint Industry Board, in that capacity, are not 'representatives' of the employees within the meaning of 29 U. S. C. 186" [R. 48], the District Court denied plaintiffs' motion for summary judgment, granted defendants' motion for summary judgment, and dismissed the complaint for injunctive relief. [R. 49.]

ARGUMENT.

Introduction and Summary of Argument.

Section 302 of the Labor Management Relations Act does not prohibit any payments other than those between an "employer" and "any representative of any of his employees" in an industry affecting commerce.

The only appellant employers making the questioned payments herein were eight San Francisco sheet metal contractors employing members of Local 104 in the Northern California counties.

The only recipient of the questioned payments was the Joint Industry Board trust fund established by agreement between other Northern California contractors and Local 75.

The District Court correctly held that the questioned payments by these eight appellant employers into the Joint Industry Board trust fund did not constitute payment of "any money or other thing of value" to any "representative" of their employees in violation of Section 302.

Since the payment or delivery of such sums by these 8 appellant employers to the Joint Industry Board trust fund did not violate Section 302(a) and the receipt or acceptance of such sums by the appellee Joint Industry Board did not violate Section 302(b), and therefore such payments did not constitute a crime made punishable by Section 302(d), no jurisdiction existed to grant any injunction against such payments by virtue of Section 302(e) and equity jurisdiction was precluded by the Norris-LaGuardia Act (129 U. S. C. §§101-115).

I.

Section 302 Only Prohibits Payments Between an "Employer" and "Any Representative of Any of His Employees" but Not Payments to Others.

A. The Statutory Language.

Paragraphs (a) and (b) of Section 302 in substance make it unlawful for *"any employer of such employees"* to offer or *"any representative of any of his employees who are employed in an industry affecting commerce"* to accept from *"the employer of such employees"* money or other valuables, except in the five instances set forth in Paragraph (c), *i.e.,* (1) compensation for services as an employee of such employer; (2) satisfaction of a judgment, arbitration award or disputed claim without fraud or duress; (3) purchase price for goods regularly sold; (4) properly checked-off union dues; and (5) payments to jointly-administered trust funds to provide health and welfare, pensions, or other specified benefits to employees and their families and dependents. (The pertinent parts of the statute are set forth in full text by the opinion of Mr. Justice Clark in *United States v. Ryan* (1956), 350 U. S. 299 at p. 303, footnote 4.)

Section 302(d) makes such practices criminal and punishable by fine and imprisonment, on the part of both *employers* and *employee representatives.* (29 U. S. C. §186(d); *Ryan* case, *supra,* 350 U. S. at p. 306.)

Appellants herein have thus doubly noted (App. Op. Br. pp. 7 and 27) the Supreme Court's observation in the *Ryan* case, 350 U. S. at p. 305, that—

> "As the statute reads, it appears to be a criminal provision, malum prohibitum, which outlaws all payments, with stated exceptions, between *employer* and *representative.*" (Emphasis supplied.)

Section 302(e) confers upon the United States District Courts "jurisdiction for cause shown . . . to restrain violations of this section." (29 U. S. C. §186(e)), so that "beyond the penalties which are purely criminal there could be injunctive powers for quick and speedy remedy." (*Dunbar Co. v. Painters and Glaziers District Council* D. C. (Dist. Col., 1955), 129 Fed. Supp. 415.)

Examination of the face of the statute discloses that Section 302(a), (b) and (c) contain "a *highly specialized restriction* on the legality of employers' agreements to make payments to employee representatives" (see *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.* (1955), 348 U. S. 437, footnote 2 of opinion); Section 302(d) imposes *criminal penalties* which "should be construed most favorably to those charged with having violated its provisions," (*In re Feller,* 82 N. Y. S. 2d 852); and Section 302(e) constitutes a "very narrow opening in the theretofore solid wall of denial of power of *injunction* in cases of labor disputes." (*Dunbar Company* case, *supra,* 129 Fed. Supp. 417.)

Despite these punitive and restrictive aspects of the legislation, which under ordinary principles of statutory interpretation would require that Section 302 be strictly construed, appellants herein rely upon the *Ryan* decision, *supra,* to urge that the "statute should be *liberally* construed to effectuate its purpose" and also that the "decision in this case should be governed not by form but by substance." (App. Op. Br. pp. 26-27.) Apparently, appellants thus seek to persuade this Honorable Court of Appeals to disregard the plain language of the statute.

The specific question decided by the *Ryan* case was that payments to the president and principal negotiator

of a labor union *"individually"* were payments to a "representative" of employees within the meaning of Section 302(b). In concluding that the statutory term "any representative of any employees" placed the identical limitations on both individuals and organizations, the Supreme Court emphasized "the precise words of the statute," "their literal meaning," "the legislative history" and "the structure of the section." (350 U. S. at pp. 302 and 305.) The "narrow reading of the term 'representative' . . ." which the Supreme Court rejected because it "would substantially defeat the Congressional purpose" (350 U. S. at p. 304) was a "technical meaning" limited to the "exclusive bargaining representative" of the employees, which in that case was the union itself (350 U. S. at pp. 301 and 305) which would have excluded payments made *directly* to union officials or to other individuals as trustees for the union from Section 302.

On the other hand, Justice Clark, speaking for a unanimous Court, make it quite clear that, in holding that ILA International President Ryan's "relationship brings him within that term" so that *"payments to Ryan individually"* were covered, "We do not decide whether any official of a union is ex officio a representative of employees under Section 302." (350 U. S. at p. 301.)

The District Court herein had before it the opinion of the Supreme Court in the *Ryan* case, decided February 27, 1956, when the instant case was argued on July 9th and decided on August 16, 1956. [R. 48.] The court below properly concluded that the *Ryan* decision did not warrant an enlargement of the scope of Section 302 beyond its precise terms [see *United Marine Division v. Essex Transportation Co.* (C. A. 3rd, 1954), 216 F. 2d

410, cited and quoted at R. 45-46], especially since "[g]rammar, the customary use of words, common sense and the legislative history of the Act all require the interpretation" finally adopted by the District Court herein. [See *Upholsterers' International Union v. Leathercraft Furniture Co.* (E. D. Pa., 1949), 82 Fed. Supp. 570, cited and quoted at R. 47.]

B. The Legislative History.

Appellants insist that Section 302 was adopted "for the specific purpose of *forbidding* any payment into any funds wholly or partially controlled by unions" except jointly-administered welfare funds for the exclusive benefit of employees with their detailed benefits specified by a written agreement, as provided by Section 302(c)(5). (App. Op. Br. p. 8, *Ibid.*, pp. 23-24 and 27.)

The legislative history of Section 302, as analyzed by the Supreme Court in the *Ryan* case, *supra,* makes it clear that in this portion of the legislation, Congress was *not* aiming solely at the welfare fund problem. By "writing a broad prohibition in subsections (a) and (b) and five specific exceptions thereto in subsection (c), only the last of which covers welfare funds," Congress enlarged the scope of this section when the Hartley bill reached the Senate "to include, in the words of Senator Taft, 'a case where the union representative is shaking down the employer. . . .' 93 Cong. Rec. 4746. . . ." (350 U. S. at pp. 304-306.)

It is true that when Congress passed the forerunner of Section 302 in the Case Bill at the previous session in 1946 (H. R. 4908, 79th Cong., 2nd Sess.), it "was disturbed by the demands of certain unions that the em-

ployers contribute to 'welfare funds' which were in the *sole control of the union or its officers* and could be used as *the individual officers* saw fit . . .", *e.g.* the United Mine Workers' 10¢-per-ton fund for "so-called welfare purposes." (350 U. S. at p. 304; emphasis added; *Senate Report No. 105 on S. 1126,* [*Supplemental Views of Senators Taft et al.*], p. 52, quoted in App. Op. Br. at pp. 8-9; *Statements of Senators Ball and Byrd,* 93 Cong. Rec. 4678, *Statements of Senator Taft,* 93 Cong. Rec. 4746-4747, quoted in App. Op. Br. at pp. 9-12.)

The Hartley bill (H. R. 3020, 80th Cong., 1st Sess.) as reported in the House of Representatives on April 11, 1947, would have made it "an unfair labor practice for an employer . . . to dominate or interfere with the . . . administration of any labor organization . . . by *assisting any labor organization* . . . through making *payments of any kind* to such organization *directly or indirectly,* or to *any fund or trust established by such organization,* or to *any fund or trust* in respect of the management of which, or the disbursements from which, *such organization can, either alone or in conjunction with any other person, exercise any control, directly or indirectly.*" (Sec. 8(a)(2)(C)(ii); emphasis added.) It also prohibited an employer from "giving, or offering to give any reward, favor or other thing of value to any person in a position of trust in such [labor] organization for the purpose of perverting his judgment or corrupting his conduct in respect to such organization." (Sec. 8(a)-(2)(B).)

Thus, the House bill was drafted to "forbid employers to pay to or for unions, or to any *funds established, maintained or controlled by them in whole or in part, directly*

or indirectly, royalties, taxes, or other exactions, instead of paying the money directly in the form of wages" and to prohibit "an employer's . . . bribing a union official, directly or indirectly." (*House Report No. 245 on H. R. 3020,* 80th Cong., 1st Sess., p. 29; emphasis added.)

The Minority Report of the House Committee on Education and Labor strongly objected to the provisions of Section 8(a)(2)(C)(ii) of the Hartley Bill as reported by the majority of the Committee (*Ibid.,* pp. 78-79), declaring in part—

> "We would have no objection to requiring that trust funds to which an employer makes contributions be *jointly controlled* by the employer and the union but under this bill an employer would be forbidden to contribute to *any fund over which the union has any control even though it is jointly administered with the employer.* This result is completely unreasonable." (Emphasis added.)

"As passed by the House of Representatives," on April 17, 1947, with Sections 8(a)(2)(C)(ii) and 8(a)(2)(B) intact, "the Hartley Bill forbade employer contributions to union welfare funds and made it an unfair labor practice to give favors to 'any person in a position of trust in a labor organization.'" (*United States v. Ryan, supra,* 350 U. S. at p. 305.)

If the House version had been finally enacted into law, Appellants would be correct when they state that "the legislation embodied in Section 302" contained a general prohibition against "any payments into any *funds wholly or partially controlled by unions*" or that "Congress in enacting Section 302 intended to forbid payments by employers into *funds even though jointly controlled by*

employers and representatives of their employees." (App. Op. Br. pp. 8 and 12; emphasis added.)

The fact is, however, as recognized by the Appellants herein (App. Op. Br. p. 18) that the House provisions relating to restrictions on payments to employee representatives and union trust funds were rejected in the Senate. In their place, an amendment offered by Senator Ball of Minnesota on May 7, 1947 (93 Cong. Rec. 4677) was adopted on the day following (93 Cong. Rec. 4755) as a new Section 302 of the Taft-Bill (S. 1126, 80th Cong., 1st Sess.).

The Joint Conference Committee substituted "the provisions of the Senate amendment with minor clarifying changes" for Sections 8(a)(2)(B) and (C) of the House version. (*House Conf. Rept. No. 510,* 80th Cong., 1st Sess., p. 67.)

Among these changes in the final legislation made by the Joint Conference Committee was the elimination of Sections 302(g) of the Senate version which defined *"representative"* for the purposes of Sections 301 and 302 of the Act.

Had the Joint Conference Committee adopted the broadest definition of "representative" in Section 302(g) of the Senate version—so as to include *"any organization or fund of which some of the officers are representatives or are members of a labor organization or are elected or appointed by a representative"* (93 Cong. Rec. 4677)—Appellants might have found some support for their bare assertion that the "Joint Industry Board Fund here involved is exactly the type of fund Congress intended to prohibit by Section 302" (App. Op. Br. p. 12). But this enlarged definition of "representative" was eliminated from

Section 302 when the "Joint Conference Committee substituted for it the definition of that term in the NLRA, as amended." (*United States v. Ryan, supra,* 350 U. S. at p. 306; see also at p. 301; both citing Sec. 501(3) of the Labor Management Relations Act.)

The term "representative" in Section 302 thus includes any individual or labor organization "authorized by the employees to act for them in dealings with their employers" concerning "employment matters." (350 U. S. at pp. 302 and 306.) Congress expressly declared in Section 501 of the Labor Management Relations Act, entitled "DEFINITIONS," that, "When used in this Act . . . [t]he term . . . 'representative' shall have the same meaning as when used in the National Labor Relations Act as amended by this Act."

As the Solicitor of the United States Department of Labor expressed it, when commenting upon "the limited meaning of the term indicated by the legislative history" (*Memorandum Opinion from the Solicitor to the Secretary of Labor,* dated December 10, 1948, quoted in full text in the *Report of the Joint Committee on Labor-Management Relations,* S. Rept. No. 986, Pt. 3, 80th Cong., 2nd Sess., p. 109):

> "In using the term 'representative' in section 302, it is, of course, clear that Congress had unions or union agents foremost in mind."

In reaching this conclusion, the Solicitor relied upon the Senate debates wherein Senators Ball and Byrd (93 Cong. Rec. 4678) as well as Senator Taft (93 Cong. Rec. 4748) described the specific purpose of Section 302.

A similar conclusion was reached by the Chief of the General Crimes Section of the United States Department

of Justice (*Testimony of Rex A. Collings, Jr.,* July 20, 1955, in *Senate Labor Committee Hearings on Welfare & Pension Plan Investigation* (1955), pp. 902-904), who rendered the opinion that—

> ". . . Section 302 only prohibits payments by an employer to representatives of his employees which do not fall within certain exceptions. It does not prohibit payments to others. . . ."

The Justice Department official cited as authority for his opinion the decisions in *Rice-Stix Co. v. St. Louis Health Institute* (E. D. Mo., 1948), 22 L. R. R. M. 2528, and *United Marine Division v. Essex Transportation Co., supra* (C. A. 3rd, 1954), 216 F. 2d 410, which latter case quotes at length from the legislative history of Section 302 (*e.g., Statements of Senators Ball and Byrd,* 93 Cong. Rec. 4678, and *Statements of Senator Taft,* 93 Cong. Rec. 4746-4747.)

"Although a 1948 committee report is no part of the legislative history of a statute enacted in 1947," the majority opinion of the Chief Justice in one of the latest decisions of the Supreme Court dealing with the interpretation of the Taft-Hartley Act (*N. L. R. B. v. Lion Oil Co.*, 352 U. S. ....., 1 L. ed. (2d) 331, 338-339, decided January 22, 1957) notes the special significance of conclusions reached as to the meaning of the statute in the final report of "the Joint Committee on Labor Management Relations, made up of members of the Congress which passed the Taft-Hartley Act" (S. Rept. No. 986, Pt. 3, 80th Cong., 2nd Sess.) and in the minority report submitted in 1949 by Senator Taft, "who was a member of the Joint Committee." (S. Rept. No. 99, Pt. 2, 81st Cong., 1st Sess.) The separate opinion of Mr. Justice Frankfurter (1 L. ed. (2d) at p. 343) in that same

case likewise cites the 1948 Report of the Joint Committee and the 1949 Minority Report of the Senate Labor Committee as "persuasive evidence" of "a reasonable interpretation of what the Taft-Hartley Congress legislated."

With respect to *"employee representatives"* under the *"Restrictions Provided in Section 302 of the Act,"* the Joint Committee of Congress created by the very act of which that section was a part to study the operation of the Federal labor laws, recorded the following instances in which the view "has already been adopted" that if the parties to a "trust fund established by collective bargaining agreement" provide for payments to trustees selected by them "then no portion of section 302 applies because the payments are not being made to a representative of the employees":

> (1) "on December 13, 1948, when the Attorney General concurred in an opinion of the Solicitor of the Department of Labor";
>
> (2) "the original neutral trustee for the miners' fund expressed his opinion that that fund was not subject to the restrictions of section 302 because the employer contributions were not made to an employee representative but to trustees."
>
> (3) "In *Rice-Six Dry Goods Co. v. St. Louis Labor Health Institute* (22 LRRM 2528, U. S. Dist. Ct., E. D. Mo., 1948), the court held that a welfare plan was not subject to the restrictions of section 302 of the Act. In this case the officers of the union had organized a corporation devoted to charitable, religious, scientific and benevolent purposes. The union and the employer entered into a collective bargaining agreement whereby the employer agreed to make payments for the benefit of his employees to the charitable corporation. . . .

> "The court ruled that such payments could lawfully be made for the reason that the charitable corporation was not a representative of any employees of the plaintiff as set forth in section 302 of the Labor Management Relations Act, 1947 and that the 'management and funds of the St. Louis Health Institute are not under the control of' the union. . . . [I]t appears from the record itself that the top officers of the union not only organized the charitable corporation but were the president and sceretary-treasurer of it." (Senate Rept. No. 986, Pt. 3, 80th Cong., 2nd Sess., pp. 97-99.)

The final report of the Joint Committee (which went out of existence as provided by statute on March 1, 1949) recommended that "serious consideration should be given by Congress to an amendment" containing "clear and unmistakeable language to the effect that no money may be paid to any trust fund which is the subject of collective bargaining except in accordance with the limitations enumerated in section 302(c)(5)." (*Ibid.*, pp. 98-99.)

If Appellants were correct in their contention (App. Br. pp. 7 and 27), that the statute already condemns payments by employers to jointly-administered trust funds established by collective bargaining "however laudable their purpose might be" and "however carefully administered and audited" if "the fund is to be used for purposes jointly agreed upon by the union and the employers which are not purposes specified and permitted by Section 302" [*i.e.*, in §302(c)(5)] such an amendment would not be necessary as that proposed in 1948 by the Joint Committee to the standing committees of the Congress dealing with Labor-Management problems, or by other legislative proposals discussed below.

In making its recommendation to the Senate Committee on Labor and Public Welfare and the House Committee on Education and Labor, for an amendment to overcome the above-mentioned "interpretations of the restrictions" of Section 302 (Senate Rept. No. 986, Pt. 3, 80th Cong., 2nd Sess., p. 7), the Joint Committee submitted therewith its "findings" (*Ibid*, p. 5) to the effect that these "provisions of the Act dealing with union welfare funds are inadequate in many respects, and the whole subject requires further study, with probably a much more fundamental regulation"; that "Section 302 was written largely to prevent the payment into welfare funds of moneys . . . often completely at the disposition of the officers of labor unions"; and finally, that the "developments" concerning interpretation of the term "employee representatives" "may permit circumvention of all the Act's restrictions by . . . contributions to an intermediary."

At the next session of Congress, proposed amendments to various provisions of the Taft-Hartley Act, including Section 302 failed of adoption. (S. 249, 81st Cong., 1st Sess.) During the legislative proceedings, however, Senator Taft and other minority members of the Senate Committee on Labor and Public Welfare submitted a report which quoted with approval from the 1948 "findings" of the Joint Committee on Labor-Management Relations and stated (Senate Rept. 99, Pt. 2, 81st Cong., 1st Sess., pp. 49-50; emphasis added):

> "The Taft-Hartley Act prohibited *employer payments to union representatives*. . . . It was first considered at a time when a dispute was in progress in the coal industry over a demand for a welfare fund *payment directly to the union*. . . . It has no doubt,

> actually promoted such funds by keeping them respectable and not subject to *racketeering or arbitrary dispensation by union officers.*"

Both the contemporary and the subsequent legislative history of Section 302 reflect that it was "a stop gap provision until a further study can be made, in order that abuses may not arise." (*Remarks of Senator Taft,* 93 Cong. Rec. 4747; see also S. Rept. 986, Pt. 3, 80th Cong., 2d Sess., p. 5; Senate Rept. 99, Pt. 2, 81st Cong., 1st Sess., p. 49.)

Since March of 1949, when the Joint Committee on Labor-Management Relations created by the Taft-Hartley Act went out of existence, various sub-committees of the Congressional standing committees on labor relation matters have conducted such further studies of the problems of health, welfare and pension funds established through collective bargaining.

In May of 1954, such an investigation was commenced by the Subcommittee on Welfare and Pension Funds of the Senate Committee on Labor and Public Welfare under the chairmanship of Senator Ives of New York. (S. Res. 225, as amended, 83rd Cong., 2nd Sess.) On February 5, 1955, further inquiry was authorized by this Subcommittee under the chairmanship of Senator Douglas of Illinois (S. Res. 40, 84th Cong., 1st Sess.) and later extended. (S. Res. 200 and S. Res. 232, 84th Cong., 2nd Sess.)

As mentioned above, Rex A. Collings, Jr., Chief of the General Crimes Section of the United States Department of Justice testfied before the Douglas Subcommittee on Welfare and Pension Funds on July 20, 1955, regard-

ing the interpretation of Section 302. (*Hearings on Welfare & Pension Plan Investigation,* pursuant to S. Res. 40 as extended by S. Res. 200 and S. Res. 232, 7/20/55, pp. 902-904.)

After explaining that Section 302 does not prohibit payments made by an employer to others than "representatives of his employees," the Justice Department official expressly advised the Senate Subcommittee of his belief that—

> "There is some doubt that the section prohibits payments to a board of trustees composed of representatives both of employer and employees, even if not set up for a purpose permitted by the section. . . . In our opinion section 302(c)(5) is not a penal clause. It does not of itself make any act or omission a criminal offense."

Legislation was thereafter proposed by the Douglas Subcommittee to require registration, reporting, and full disclosure of the administrative details of all major health, welfare and pension plans, including jointly-administered trust funds. (S. 3873, 84th Cong., 2d Sess.)

As noted by the final report of the Douglas Subcommittee to the full Senate Committee on Labor and Public Welfare of the 84th Congress, filed on April 6, 1956 (pp. 77-81), three other bills of a similar nature were also introduced in the 84th Congress. (S. 1717, 84th Cong., 1st Sess., by Senator Humphrey of Minnesota; S. 3051, 84th Cong., 2d Sess., by Senators Ives of New York and Allott of Colorado; and H. R. 2132, 84th Cong., 1st Sess., by Representative Gwinn of New York.)

The last mentioned Gwinn bill, originally introduced in the 83rd Congress, 2d session, as H. R. 9705, proposed

specific amendments to Section 302 of the Taft-Hartley Act by which the *"Prohibitions already in parts (a) and (b) of section 302,* making unlawful payments by an employer to a representative of his employees, and the receipt of such payments by a representative [would] have been *enlarged to preclude payments to, or receipt by, any fund of which the representative is an officer, director, trustee or administrator."* (Douglas Subcommittee Report, 4/6/56, p. 78; emphasis added.)

During 1956, the Permanent Subcommittee on Investigations of the Senate Government Operations Committee under the chairmanship of Senator McClellan of Arkansas, began a study of alleged criminal and corrupt practices with respect to welfare funds and other matters by certain few union and management organizations.

On January 30, 1957, the Senate established a Select Committee to Investigate Improper Practices in the Labor-Management Field, also under the chairmanship of Senator McClellan, which is currently conducting hearings relating to alleged "racketeering," including charges of maladministration of particular welfare funds.

Bills requiring registration, reporting, and disclosure by welfare and pension funds, including those jointly-administered by Labor and Management, have been introduced into the present Congress by Senators Douglas (S. 1122, 85th Cong., 1st Sess.) and Ives (S. 1145, 85th Cong., 1st Sess.).

To date, however, the language of Section 302 has not been altered by Congress and remains in its original form as first adopted over the Presidential veto on June 23, 1947. None of the bills mentioned above, including those specifically amending Section 302 to achieve the

result sought by Appellants herein, were ever enacted into law. The Act still is limited to a general prohibition against payments to employee "representatives" in Section 302(a) and (b) and does *not* make payments to a Joint Labor-Management Trust Fund illegal *per se* because it does not comply with Section 302(c)(5).

C. The Congressional Purpose.

Appellants have selected certain partial quotations from the legislative history of Section 302(c)(5), (App. Op. Br. pp. 8-12; 18; 22, quoting from *Legislative History of Labor Management Relations Act, 1947*, pp. 458, 1304 and 1310-1313), to support their contention that Section 302 *in its entirety* was adopted "for the specific purpose of *forbidding* any payments into funds wholly or partially controlled by unions except funds for the exclusive benefit of employees with their benefits clearly specified."

Judicial examination of the legislative history of the *entire* Section 302 in previous cases demonstrates the fallacy of this argument as to the actual legislative intent.

The language of Section 302 "was very deliberately intended to prevent kickbacks, prevent bribes, prevent things that make for labor racketeering." (*Dunbar Co. v. Painters and Glaziers District Council No. 51, supra*, (D. C. Dist. Col., 1955), 129 Fed. Supp. 417.)

The constitutionality of Section 302 rests upon the Congressional power to "curb adequately the evils of extortion and bribery" and "avoid transactions which may give rise to conflict of interests between the employer and employee representation." It thus represents an exercise of Congressional jurisdiction over "[p]ractices which are

wrong and harmful to labor-management relations and inimical to public welfare and those which are potentially wrong in that field." (*United States v. Connelly* (D. C. Minn., 1955), 129 Fed. Supp. 786.)

In the *Essex Transportation Company* case, *supra* (C. A. 3rd, 1954), 216 F. 2d 410, construing and interpreting Section 302 "as a question of law only," Circuit Judge Goodrich stated for a unanimous court that—

> "We think that in this instance the promise of the employer . . . was not a promise 'to any representatives of any of his employees.' The promise alleged was to pay these trustees. These trustees were not in our opinion representatives of the employees. They were trustees of a welfare fund. *It is true they were chosen half and half by the employers' association and this union. But we think that when set up as a board, as they were in this case, these individuals are not acting as representatives of either union or employers.* They are trustees of a fund and have fiduciary duties in connection therewith as do any other trustees. The terms under which they act were carefully spelled out.
>
> "We think that the promise in *this case is outside the evil which the Congress was endeavoring to erase* in the sections of the statute which we have quoted. Since the fact situation is outside that evil, we do not think we should enlarge an applicaion of the statute to void this type of arrangement which has met with legislative sanction, judicial approval, and is a growing trend in employer-employee relations." (Emphasis added.)

Joint Labor-Management trust funds were there said to be "a social device to be encouraged." (See also *Upholsterer's International Union v. Leathercraft Furniture*

Company (D. C. Pa., 1949), 82 Fed. Supp. 570; *Van Horn v. Lewis* (D. C. Dist. Col., 1948), 79 Fed. Supp. 541; *United Garment Workers v. Jacob Reed's Sons* (D. C. Pa., 1949), 83 Fed. Supp. 49; *In re Feller, supra.*)

While in the *Essex* case, the fund in question was a pension trust fund, the District Court in the instant case properly held [R. 46] that *"the rationale of the Essex case seems to be equally applicable here"* since the "Joint Industry Board will hold the funds in question in trust for the purposes enumerated in the Trust Agreement" which tend to promote the socially-desirable objectives of industrial peace, increased productivity, and economic betterment of both employers and employees. (See *Bay Area Painters and Decorators Council v. Orack, supra,* 102 Cal. App. 2d 81.)

The legislative history of Section 302 quoted at length in the *Essex Transportation Company* opinion clearly demonstrates that the purpose of the amendment was not to prohibit such funds, as Appellants contend (App. Br. p. 12), "but to make sure that they are legitimate trust funds" and "that they shall not degenerate into bribes" or "a war chest for the particular union" or a "fund to be controlled exclusively by the labor union."

Section 302 "makes extortion illegal" and "proceeds on the theory that union leaders should not be permitted . . . to divert funds paid by the company, in consideration of the services of employees, to the union treasury or the union officers . . .", that is to say "such funds . . . agreed upon by collective bargaining . . . should not be subject to racketeering or abitrary dispensation by union officers." (Senate Rept. No. 105, 80th Cong., 1st Sess., p. 52.)

As Senator Taft himself indicated (93 Cong. Rec. 4746) "the legislation was occasioned by alleged efforts by John L. Lewis of the United Mine Workers of America to build up a tremendous fund in the hands of the officers of the labor union . . . which they may use indiscriminately," and "the purpose of the provision" was to prevent the creation of such a fund "in the sole discretion of the union or the union leaders and useable for any purpose which they may think is to the advantage of the union or the employee." Quoting the specific language of Section 302(a), Senator Taft defined the proscribed payments to employee representatives as "a case of extortion or a case where the union representative is shaking down the employer." (*Ibid.*)

The substantive evil sought to be remedied by Section 302 was thus defined by Senator Ball as the "very grave danger that the funds will be used for the personal gain of union leaders, or for political purposes, or other purposes not contemplated when they are established, and that they will become rackets." (93 Cong. Rec. 4678.) "The specific purpose" as defined by Senator Byrd was "to prohibit labor unions from requiring welfare funds to be paid into the treasuries of the labor unions" and contemplated that "the money shall go to a trust fund that shall be mutually administered by the employer and the employee."

The findings of the District Court with respect to the circumstances of this case which are amply supported by the stipulated facts, were that—

> (1) "The Joint Industry Board will hold the funds in question in trust for the purposes enumerated in the trust agreement." [R. 46.]

(2) "The Board consists of six members for the employers and six members for the union. Decisions of the Board are made by a concurrence of a majority of the employer members with a majority of the union members. . . . [T]he power to expend the funds contributed by the employers, resides in the Board, and is thus dependent upon the approval of the employer members." [R. 43.]

(3) "The Joint Industry Board is not a part of the union, and its governing agreement expressly provides for the separate character of the Board from either of the parties and expressly preserves their duties and relationships with respect to each other and each of them with respect to their members. The agreement provides for a careful accounting and separate deposit system for Joint Industry Board funds from those of the union. If the employer members refuse to sanction an expenditure, for any reason, there is a provision for arbitration in the agreement." [R. 47-48.]

The District Court herein properly found that it was the "purpose of Congress to prevent misuse of funds, and the possibility of the concealment of bribes and extortions in the form of payments by Employers to labor representatives" [R. 45] and that the Joint Industry Board Fund was not established nor operated contrary to such legislative aim.

There is no evidence or contention in this case that "the trustees use, or attempt to use, directly or indirectly, the fund for a purpose" not authorized by the Trust Agreement of the Joint Industry Board or are "burdening the fund with undue administrative expenses or lush salaries for union officials," nor do Appellants seek to "enjoin the trustees from making . . . improper ex-

penditures." [See *Upholsterers' International Union v. Leathercraft Furniture Co., supra,* 82 Fed. Supp. at p. 573, quoted at R. 47.]

Since in the present case, as in the *Essex Transportation Company* case, the fact situation is outside the evil which Congress was endeavoring to reach, the application of the statute should not be *enlarged* to void the Joint Industry Board Fund here involved.

II.

Eight San Francisco Sheet Metal Contractors Employing Members of Local 104 in the Northern California Counties Were the Only Appellant Employers Making the Questioned Payments.

The First Cause of Action of the Complaint herein alleged that "Defendants are attempting to cause and compel plaintiffs to pay and deliver money and other things of value to defendant Joint Industry Board." [Complaint, R. 9.]

The Second Cause of Action alleged that "Defendants are attempting to compel plaintiffs to pay and deliver money and other things of value to defendant Local Union No. 75." [Complaint, R. 10.]

The Third Cause of Action alleged that "pursuant to and in compliance with the demands and threats of defendants, the plaintiffs listed below [Apex Sheet Metal Works; Atlas Heating and Ventilating Co., Ltd.; Gilmore Air Conditioning Service; Scott Co.; Western Plumbing & Heating Co., Inc., and Ace Sheet Metal Works] have paid to defendant Joint Industry Board the sums set opposite their names." [Complaint, R. 10.]

The "Stipulation of Facts" herein conclusively discloses that the six specific firms named in the Third Cause

of Action plus two others [Valley Sheet Metal Co. and Otis Sheet Metal, Inc.] are the only plaintiff employers making the questioned 2½¢ an hour payments into the Joint Industry Board Fund or who in any manner have been compelled to do so or to agree to do so. [Stipulation, Pars. 9, 10 and 11; R. 19-21.]

In the case of the plaintiff firms and corporations who have not paid nor been compelled to agree to pay anything to the questioned Joint Industry Board Fund or to any defendant, all defendants were obviously entitled to a summary judgment in their favor and an order of dismissal, under any theory of the case.

In addition to the alleged causes of action alleged herein by the plaintiff individuals, firms and corporations who are members of the Sheet Metal Contractors Association of San Francisco, the plaintiff Contractors' Association itself sought relief under Paragraph (e) of Section 302 of the Taft-Hartley Act.

The "Complaint" herein alleged generally [R. 7] that "plaintiffs are employers of employees engaged in an industry affecting commerce within the meaning of Section 302" and specifically as to the plaintiff Sheet Metal Contractors Association of San Francisco only that it is a California corporation. [R. 6.]

By their "Answer," defendants denied that the plaintiff Contractors' Association is such an "employer." [R. 12.]

The "Stipulation of Facts" disclosed merely that "Plaintiff employers are and for several years last past have been members of Sheet Metal Contractors Association of San Francisco," who have authorized such Association "to negotiate and enter into a collective bargaining agree-

ment with Local Union No. 104," in the capacity of "agent of plaintiff employers." [R. 17-18.]

Such "Stipulation of Facts" disclosed conclusively that the plaintiff Contractors' Association is not itself an "employer" within the meaning of Section 302 and has not itself paid nor been compelled to agree to pay any "money or other thing of value" to the Joint Industry Board Fund or to any defendant.

Accordingly, defendants were clearly entitled to a summary judgment against the plaintiff Sheet Metal Contractors Association and to an order dismissing the complaint in the case of said plaintiff Contractors' Association, under any theory of the case.

III.

The Payments Were Made Solely to the Joint Industry Board Trust Fund Established Under the Collective Bargaining Agreement Between Other Northern California Contractors and Local 75, and Were Not Made to Any Representative of Plaintiffs' Employees.

The "Stipulation of Facts" conclusively disclosed that no payment of "any money or other thing of value" has been paid or offered to be paid by any of the plaintiff employers to any of the defendants except payments by the eight employers named above to the defendant Joint Industry Board, and that no efforts to compel the making of such payments have been undertaken by any of the defendants except defendant Local 75. [R. 20-21.]

Obviously, based upon such stipulated facts under any theory of the case this action was properly dismissed as to the defendants Sheet Metal Workers International Association and its Local Union No. 104, which have neither

received, accepted, nor sought to compel the questioned payments.

Assuming for sake of argument that the eight specific plaintiff employers who made the questioned payments to the Joint Industry Board Fund herein "are engaged in an industry affecting commerce within this district" and "are employers of employees engaged in an industry affecting commerce within the meaning of Section 302" as alleged [see Complaint, Par. IV, R. 7; cf. Answer, Par. IV, R. 12; see Stipulation of Facts, Par. 1, R. 17 as to collective commerce data for all 28 plaintiff employers], the question still remains as to which of defendants are the "representatives" of their employees.

The Complaint herein alleged that "Said International Association, Local Union No. 104, Local Union No. 75 and W. R. White are representatives of the employees of plaintiffs." [R. 8.] No such allegation is made as to the defendant Joint Industry Board.

The "Answer" admitted only that "defendant Local Union No. 104 is the collective bargaining representative of the journeymen sheet metal workers and apprentices employed by the plaintiff[s]." [R. 12-13.]

The "Stipulation of Facts" establishes only "Local Union No. 104 as the representative of the employees of plaintiffs" [Par. 2, R. 17], and as discussed hereinabove that organization did not receive, accept, or seek to compel the questioned payments, and was entitled to recover a judgment of dismissal on that ground alone.

Defendant Local 75 is the representative of employees of "various employers, other than the plaintiffs doing business in the Counties of Marin, Sonoma, Mendocino, Lake, Napa and Solano, California" [Stipulation of Facts,

Par. 4, R. 18], but the employees of the eight plaintiff employers acting as sheet metal workers on jobs in such six counties of Northern California during 1955-56 "were members of defendant Local No. 104." [Stipulation of Facts, Par. 9, R. 19.]

Under any theory of the case, all defendants (other than Local 104) were entitled to be dismissed from this action on the ground that they were not shown to be "representatives" of plaintiffs' employees within the meaning of Section 302.

IV.

The District Court Correctly Held That the Questioned Payments to the Joint Industry Board Trust Fund Were Not Made in Violation of Section 302.

Appellants assign as their underlying specification of error below the District Court's refusal to hold that "payments by appellant employers into the Joint Industry Board Fund constituted payments of money or other thing of value by employers to a representative of their employees who are employed in an industry affecting commerce." (App. Br. p. 4.)

Although the "Complaint" herein does not allege that the defendant Joint Industry Board is such an employee representative, the District Court noted that:

> (1) "The claim of plaintiffs is that the payment, pursuant to the 'Trust Agreement of Joint Industry Board' of 2½¢ per man-hour to the Joint Industry Board Fund . . . violates Section 302 of the Labor Management Relations Act of 1947" [R. 44]; and
>
> (2) "The question for decision, therefore, is whether this agreement for payments to the Joint

> Industry Board which is composed of six employer and six union members is an agreement to pay to 'any representative of any of his employees' within the meaning of 29 U. S. C. A. 186."

Appellants take exception to the conclusion of the District Court that under the doctrine of the *Essex Transportation Company* case, *supra*, 216 F. 2d 410, payments to the Joint Industry Board fund did not constitute payments to a "representative of employees."

A. The Rationale of the Essex Case Is Equally Applicable Here.

The *Essex* case was a suit brought by a plaintiff union to compel payments to trustees of a pension trust based upon an *oral agreement* by the defendant employer.

There, as here, the trust fund was established by a written agreement between the union and an employers' association, specifying the purposes for which it was created, and providing for joint administration by a board of trustees, half of whom were chosen by the union and half by the employers' association.

There, as here, the employer involved was not a member of the association which negotiated the trust agreement nor a party to any contract which that association made with the union.

Contrary to Appellants' argument that the decision in the *Essex* case was based upon compliance with the welfare trust fund requirements of Section 302 (App. Br. pp. 4, 5, and 18), the Third Circuit's "decision was rested on the ground that the agreement to pay money to the six trustees was not a promise to pay to 'any representative of any of his employees' within the meaning of subsec-

tions (a) and (b)" and "the court seems to have recognized that the provision in subdivision (c)(5) of §302, excepting trust funds, was not applicable." (*Annotation; Labor Management Relations Act—§302,* 100 L. ed. 343, 345.)

Similarly, the decision of the District Court for the Eastern District of Missouri in *Rice-Stix Co. v. St. Louis Health Institute, supra,* 22 L. R. R. M. 2528, did not rest upon compliance with §302(c)(5). Holding that payments by the plaintiff employer to the defendant Health Institute (which was controlled by a joint board of trustees with the head of the union as president and the union business agent as secretary-treasurer) were not prohibited by Section 302, the opinion of District Judge Moore relied upon findings that the Institute was "not a representative of any employees of any employer" and "none of the money paid to the St. Louis Health Institute are paid to any representative of any employees of any employer."

Comparable findings by the District Court in the present case with respect to the Joint Industry Board should be affirmed.

B. The Joint Industry Board Members Are Trustees and Not Employee Representatives.

1. Existence of the Trust Relationship.

Appellants argue that no trust was created by the "Trust Agreement" establishing the Joint Industry Board because, it is contended, "no trustees are named, created or appointed" by the document. (App. Br. p. 13.)

The findings of the District Court, contrary to this contention (*i.e.*, expressly that "The Joint Industry Board

will hold the funds in question in trust for the purposes enumerated in the Trust Agreement" and impliedly that, as in the *Essex* case, "They are trustees of a fund and have fiduciary duties in connection therewith as do any other trustees," [R. 46], are amply supported by Paragraphs 7 and 8 of the "Stipulation of Facts." [R. 19.]

The stipulated facts establish that on the date of execution of the "Trust Agreement" (June 10, 1955) and before the effective date when payments to the fund commenced (July 1, 1955), the Northern California employers' association and Local Union No. 75 each respectively "nominated and appointed" six designated persons "to act on its behalf as trustees of said trust, and said persons so named accepted said nominations and appointments and were and are acting as such trustees." [R. 19.]

In any event, technical language is not necessary to the creation of a trust and the failure of the instrument to name a particular trustee or use the words "upon trust" is immaterial if it appears from the whole instrument that the intention was to create a trust. (*Estate of Clippinger* (1946), 75 Cal. App. 2d 426.)

2. Beneficial Charitable Nature of the Trust.

Appellants further contend that no trust was created because "the power reserved to the union and the association to remove and replace their representatives on the Joint Industry Board constituted by (sic) the board members *mere servants or agents.*" (App. Br. pp. 13-17, citing *Goldwater v. Altman* (1930), 210 Cal. 408, 461, and *Bernesen v. Fish* (1933), 135 Cal. App. 588.)

Decisions cited by Appellants with respect to the property interests and personal liability of certificate holders

under the form of business organization known popularly as a *"Massachusetts Trust"* are completely inapplicable to the instant case.

A "Massachusetts Trust" is a commercial organization or profit-sharing arrangement resembling a business partnership or joint stock company which was the predecessor of the business corporation. It is wholly distinguishable from the usual private or charitable trust. (25 Cal. Jur. 283; *Kadota Fig Ass'n v. Case-Swayne Co.* (1956), 73 Cal. App. 2d 796, 803; *Lincoln v. Superior Court* (1942), 51 Cal. App. 2d 61, 67.)

Thus, the *Restatement of Trusts* which covers private and charitable trusts generally, does not deal with business (Massachusetts) trusts. (*Rest. Trusts*, §1.)

The legal existence of a "trust" in the ordinary sense of that term depends primarily upon the creation of a fiduciary relationship in which one or more persons hold the legal title to property, subject to an equitable obligation to keep or use it for the benefit of other persons. (*Rest. Trusts,* §2.)

The declaration of trust, in such case, may and should provide a practical method of appointing successors and filling vacancies. (Cal. Civ. Code, §2287; see *Estate of Barnett* (1949), 97 Cal. App. 138, 143.)

The creators of such a trust have the right to appoint their own trustees and may provide a method of procedure for the appointment of a successor or successors on such terms as they choose to impose. (90 C. J. S. 141.)

As Judge Goldborough indicated in his oral opinion in *Van Horn v. Lewis, supra* (D. C. Dist. Col., 1948), 79 Fed. Supp. 541, funds created by collective bargaining agreements for the welfare of employees must be con-

strued as being *beneficial trust funds* governed by the rules applicable to *charitable trusts*. Such funds "may properly be classified as charitable trusts inasmuch as they are for social betterment as against private gain and they are of such size and the membership qualifications are so broad that the trust provides substantial benefits to the community in general." (Final Report of Subcommittee on Welfare and Pension Funds, Senate Committee on Labor and Public Welfare, 84th Cong., 2d Sess. (1956), at pp. 64-65, citing Bogert, *Trusts and Trustees,* Vol. 2-A, p. 20, and the cases of *Van Horn v. Lewis; Upholsterers International Union v. Leathercraft Furniture Co.*, and *United Garment Workers of America v. Jacob Reed's Sons, et al.,* all *supra;* see also *Annotation: Charitable Gift: Pension Fund,* 28 A. L. R. 2d 428, 431, citing *Van Horn v. Lewis* at footnote 2 thereof.)

Because of the practical and legal necessity for "equality in administration" in Joint Labor-Management Trust Funds, established by collective bargaining agreements, on a multi-employer basis, the collateral trust agreement usually makes specific provision for the replacement or substitution of trustees by the designating groups at will and merely upon adequate notice to the other trustees, as in the present case. (*Proceedings of New York University Seventh Annual Conference on Labor* (1954), p. 596.) The power to make an immediate temporary replacement of deceased trustees and an eventual permanent replacement is particularly important to maintain joint administration in Labor-Management trusts, for otherwise the surviving trustees take title and control under the general law. (Cal. Civ. Code, §§860 and 2288.)

The treatises of Bogert and Scott on Trusts detail the characteristics of beneficial trust funds or charitable trusts

which the District Court properly found to be present in the case of the Joint Industry Board Fund herein; namely,

(1) a designated trustee or trustee group;

(2) to hold certain property or funds;

(3) and apply it or its income;

(4) for enumerated socially-valuable purposes;

(5) for unidentified beneficiaries;

(6) who belong to a particular class or group of the public.

While the District Court herein concluded that the purposes set forth in the Joint Industry Board Trust Agreement "are not entirely clear" and amounted to "purposes of a rather large and vague nature," it found that they could be made clear when "read in the context of the collective bargaining agreement" as intended by the contracting parties. [R. 43 and 46.] That which can thus be made certain is certain under the law. (Cal. Civ. Code, §3538.) When properly defined in this way, the purposes of the Joint Industry Board Trust Fund appear to include [R. 43-44]:

(1) "the establishment and administration of a *joint arbitration committee* to settle all grievances arising between the parties [i.e., the Northern California employers' and Local Union #75], or any of them or any of the members of either of them, whether or not related to the collective bargaining contract";

(2) "the establishment, supervision and administration of a *joint apprenticeship program,* including a training program and a program for attracting desirable persons to the industry";

(3) " 'to assist and aid' the industry in *maintaining high standards of skill,* and to render assistance

to employers, unions, and individuals in the industry for the purpose of effectuating high standards in the industry";

(4) "to carry on *publicity and lobbying for the benefit of the industry.*"

Such activities for the direct benefit of all employees and their employers engaged in the Sheet Metal Industry in Northern California and the indirect benefit of the community at large through the promotion of industrial peace, increased availability and skills of qualified tradesmen, and training of young persons in a recognized craft are clearly "charitable purposes" under the law of trusts.

That term as used in the law of trusts has a very broad meaning, based upon the definition of charitable purposes in the preamble to the old English Statute of Charitable Uses enacted in 1601. (Stat. 43 Eliz., Ch. 4; 7 Pickering's Eng. Stats., p. 43; see *Rest. Trusts,* §368, and decisions in *Estate of Tarrant* (1951), 38 Cal. 2d 42, 46, 237 P. 2d 505; 28 A. L. R. 2d 419, and *Estate of Henderson* (1941), 17 Cal. 2d 853, 857. Also see *Annotation: Charitable Gift—Pension Fund, supra,* 28 A. L. R. 2d at p. 429, quoting the Restatement of Trusts, §368, Comment a.) This Elizabethan Statute arose out of economic dislocations caused by the transition to expanding mercantilism in Tudor times, when hordes of work-seeking laborers were idle and the trade guilds, languishing themselves, no longer could aid their distressed members. (*Annotation: Charitable Trust—Validity,* 12 A. L. R. 2d 849, 853-854.)

It has been explained, however, that under modern conditions, "Relief of poverty is not a condition of charitable assistance. If the benefit conferred has a sufficiently

widespread social value, a charitable purpose exists," as where "its aims and accomplishments are of religious, educational, political or general social interest." (*Estate of Henderson, supra,* 17 Cal. 2d at p. 857, citing *Rest. Trusts,* §§368 and 374; and *Collier v. Lindley* (1928), 203 Cal. 641; see also *Estate of Tarrant, supra,* 38 Cal. 2d at p. 50.)

As to what other purposes are of widespread social value, no definite rule can be laid down. (*Rest. Trusts,* §368, Comment b.) The Restatement of Trusts declares that "Other purposes of the same general character are likewise charitable. The common element of all charitable purposes is that they are designed to accomplish objects which are beneficial to the community."

Associate Justice Spence thus wrote for a unanimous California Supreme Court in the 1951 *Tarrant* case, *supra,* 38 Cal. 2d at p. 46—

> "Since the enactment of the Statute of Charitable uses in 1601 . . ., provisions for the 'supportation, aid and help of young tradesmen, handicraftsmen and persons decayed' have been recognized as charitable in their design to 'accomplish objects which are beneficial to the community.' (Rest., Trusts, §368.) The scope of the word 'charity' changes and enlarges with the needs of men and must advance with the progress of civilization so as to encompass varying wants of humanity properly coming within its spirit." (Citing *People v. Dashaway Assn.* (1890), 84 Cal. 114, 122, and *Rest. Trusts,* §374.)

In *Collier v. Lindley, supra,* that same Court unanimously upheld the validity of a trust instrument as creat-

ing a charitable trust which included among its main purposes the following (203 Cal. at p. 646; emphasis added):

(1) "To *improve working conditions* for men, women and children by:

(a) Investigating the *causes of industrial accidents and diseases;* including, among other things, the relation of the *hours of labor* to the *health of workers,* and the *conditions under which work is performed;*

(b) Helping, by all lawful means, to prevent the continuance of conditions inimical to the *health, welfare and safety of workers,* and helping to secure *better working conditions* for them."

(2) "To *improve living conditions of the working people* . . . by any legitimate means."

(3) "To *induce, encourage and support industrial cooperation* to the end that *justice* may be done *to employer and employee alike* and harmony be established and maintained between them *and industrial hatred and strife abolished* thereby benefiting mankind in general."

(4) "To encourage and give educational opportunities for the *study of* . . . *Industrial problems* with special reference to improvements in living and working conditions of the working people."

Estate of Murphey (1936), 7 Cal. 2d 712, 714, followed the doctrine of the *Collier* case, *supra,* by holding the following purposes within the broad definition of "charitable purposes" in the case of a "political" organization for the benefit of members of a particular religious faith:

(1) "To *safeguard the civil, political, economic and religious rights*" of members of the particular faith;

(2) "To *develop* an articulate, intelligent, widespread and compelling *public opinion* touching . . . interests and problems" of such members;

(3) "To *gather and disseminate information* concerning such interests and problems, and to *foster the free and open discussion* of them."

(4) "To *secure and maintain equality of opportunity*" for such members;

(5) "To secure . . . in every lawful manner . . . *effective remedies, assistance and redress in all cases of injustice, hardship or suffering* arising out of discriminatory measures or . . . the violation or denial of their lawful rights against such members."

People v. Cogswell (1928), 113 Cal. 129, 134 (cited by the California Supreme Court in the *Collier* and *Henderson* opinions, both *supra*), upheld a trust as being for valid charitable purposes where its object was to provide *"practical training in the mechanical arts and industries."*

The definition of "charitable uses cannot be limited to any narrow and stated formula." While the "underlying principle is the same," its application is as varying as the wants of humanity" and "where new necessities are created new charitable uses must be established." (*People v. Dashaway Ass'n, supra.*)

That the purposes of a joint Labor-Management industry organization of the type here involved are "designed to accomplish objects which are beneficial to the community" (*Rest. Trusts,* §368) was recognized by the Cali-

fornia District Court of Appeal in *Bay Area Painters Joint Committee v. Orack, supra,* 102 Cal. App. 2d at pp. 85-86, when it stated:

> "It has long been recognized, and it is clearly a desirable situation to achieve, that *employers and unions work together for stability in the industry.* . . . [I]f an employer enters into an agreement with the union and fails to conform to the working conditions, it would result in unfair competition among other employers, and would also create *unrest, labor disturbances, and many other situations that would work to the disadvantage of public welfare.* It is therefore proper for associations of employers to agree on methods of procedure . . . and a non-member who adheres to the agreement may well join in such an agreement for the purpose of producing stability in the industry. It follows as a matter of course that there is a certain cost involved in supervising and policing the industry. It is proper to be borne by a charge placed on the employers. . . . [A]greements entered into between employers and unions for the bettering of conditions in the industry, even where the employer is called upon to bear a charge involved therein, do not constitute illegal monopolies or restraints of trade. . . . To the contrary, . . . *provisions that would produce harmony and peace in an industrial activity are of the type that ought to be encouraged, and the courts should make effort to see that they are lived up to for the purpose of producing industrial peace that would so benefit the community.*" (Emphasis added.)

3. Scope of the Trust Purposes.

The District Court herein found (1) that "the purposes enumerated in the Trust Agreement, while in certain cases auxiliary to collective bargaining procedures, go beyond them and are not confined by the terms of the collective bargaining agreement except in case of conflict" [R. 46]; (2) that these purposes include such broad activities as "a joint arbitration committee"; "a joint apprenticeship program"; technical "assistance to employers, unions, and individuals in the industry"; and "publicity and lobbying for the benefit of the industry" [R. 43-44]; and (3) that the "Joint Industry Board will hold the funds in question in trust," subject to expenditure for these enumerated purposes only. [R. 46.]

Appellants attack these findings by arguing that the "legal effect" of the "Trust Agreement" is that "the payments into the Joint Industry Board Fund were exactly the same as payments into a *joint bank account* in the names of the union and the association" (App. Br. p. 17). They contend that the "purposes of the fund are so broad and vague the moneys can be used for *any purpose representatives of both sides agree upon*" (*Ibid.*, p. 13) and "*without violating* the so-called 'trust agreement,' the monies in the fund could be applied to a variety of purposes which the union as such desires or which are to the advantage or benefit of the *union as such.*" (*Ibid.*, p. 5, see also pp. 7, 12, 19, 20.) In summary, "Appellants contend that the very *broad scope* of purposes and activities [of] the Joint Industry Board together with the *degree of control* exerted by the union over half of the trustees is sufficient to constitute the employer contribu-

tions payments of monies or other thing of value to a representative of their employees." (*Ibid.*, p. 6, see also pp. 16-17, 28.)

Certainly, the concededly broad scope of the purposes and activities of this Joint Industry Board does not affect its status as a valid beneficial or charitable trust. If the founders describe the "general nature" of such a trust, they "may leave the details of the administration to be settled by trustees," subject to judicial supervision, if necessary. (*Russell v. Allen,* 107 U. S. 163, quoted in *People v. Cogswell, supra,* 113 Cal. at p. 137.)

In *Collier v. Lindley, supra,* 203 Cal. at pp. 655-656, the Appellant unsuccessively urged that the attempted trust foundation was wholly invalid because "the powers and functions with which the trustees thereof are invested are too indefinite to justify the court in upholding it and by so doing is creating in them a perpetuity with practically unlimited powers." Read as a whole, the manifest object of the creators of that trust was to bring about the adoption of concrete legislation and certain particular social and economic reforms and to encourage and support such social and economic practices as "a cooperative system of marketing" and "industrial cooperation as between employers and employees" by directing the trustees to conduct investigations, provide educational opportunities, disseminate information, and use other lawful means which in the judgment of the trustees might be useful in carrying out the purposes of the trust. The fact that the powers of the trustees were not more exactly defined did not render the trust itself invalid.

In the present case, as in *Collier v. Lindley,* 203 Cal. at p. 652, the main attack which the appellants make upon

this trust is not directed against "the expressed purposes of its creation taken as a whole," which concededly may be "laudable," "desirable" or "beneficial." (App. Br. pp. 7, 22 and 23.) Rather this attack consists of the above-mentioned "charge of indefiniteness" levelled against the provisions outlining the purposes of the trust and the powers and functions of the trustees, namely, that these provisions are "too indefinite."

The extremely wide choice and broad discretion vested in the trustees which is inherent in every charitable trust does not create a vice in the trust which makes it too vague, uncertain and indefinite to be upheld by the courts, unless the trust is attempted to be created by such equivocal or meaningless language, that the intent of the trust instrument cannot be made reasonably certain upon interpretation according to law. (*Estate of Bunn* (1949), 33 Cal. 2d 897.)

Examination of the Trust Agreement herein reveals that there is no merit to Appellants' argument that the "Trust Agreement" is too indefinite because it supposedly gives the union "a general power of appointment or the right to designate how the money shall be spent" (App. Br. p. 27). or at least, gives the joint trustees designated by the union and the employers' association "almost unlimited authority to determine how the money should be spent." (App. Br. p. 12, see also pp. 23 and 28.) In truth, Joint Industry Board funds could not conceivably be used to defray general union expenses or otherwise diverted to the union as an indirect payment without violating the Trust Agreement.

The District Court herein correctly ruled that "The Joint Industry Board is not a part of the union, and

its governing agreement expressly provides for the separate character of the Board from either of the parties, and expressly preserves their duties and relationships with respect to each other and each of them with respect to their members. The agreement provides for a careful accounting and separate deposit system for Joint Industry Board funds from those of the union. If the employer members refuse to sanction an expenditure, for any reason, there is a provision for arbitration in the agreement." [R. 47.]

Moreover, since "[d]ecisions of the Board are made by a concurrence of a majority of the employer members with a majority of the union members," the District Court properly concluded that "the power to expend the funds contributed by the employers resides in the Board, and is thus dependent upon the approval of the employer members." [R. 43; Cf. App. Br. pp. 21-22.]

Insofar as Appellants argue that there exists the possibility of diversion of funds to the union even in the face of these express safeguards in the form of joint control and mutual administration by an equal number of Employer-appointed and Union-appointed trustees, the District Court fully answered that argument by pointing out that if the joint trustees used or attempted to use the fund, directly or indirectly, for such unauthorized purposes, a court of equity would "enjoin the trustees from making the improper expenditures." [R. 47; citing *Upholsterers' International Union v. Leathercraft Furniture Co., supra,* 82 Fed. Supp. 570, 573. Cf. App. Br. pp. 6-7.]

Under the general law of trusts, a trustee "must fulfill the purpose of the trust as declared at its creation." (See

Cal. Civ. Code, §2258.) In the case of charitable trusts in particular, if the trustees "in any way abuse their trust, equity will correct the abuses and remove the offenders" (*People v. Cogswell, supra,* 113 Cal. at pp. 141-142), but the mere possibility that such abuses could have taken place will not invalidate the trust. Courts of equity possess enlarged judicial powers in giving effect to trusts for charitable uses by directing trustees to fulfill the purposes declared by its creators in the trust instrument. (*Collier v. Lindley, supra,* 203 Cal. at pp. 654-655.)

Since "the rules applicable to charitable trusts undoubtedly apply" to beneficial funds established through collective bargaining, if the required majority of the joint trustees "should undertake to misuse the fund in such a way that it obviously would not be in accordance with law, or with the agreement," any interested person "will have a right to come into the Court and ask that the Trustees be directed how they should use the fund." (*Van Horn v. Lewis, supra.*) The trustees of such a fund "have fiduciary duties in connection therewith as do any other trustees." (*United Marine Division v. Essex Transportation Co., supra.*) Abuses in the administration of such funds will not be tolerated by the courts. (*Upholsterers' International Union v. Leathercraft Furniture Co., supra.*)

Even where the collateral trust instrument relating to a beneficial fund established through collective bargaining expressly confers "full authority" upon the joint trustees seemingly amounting to "unlimited discretion," the courts will still resort to the trust agreement itself "to define the limits of a trustee's powers" which are necessarily "subject to the stated purposes of the fund." If the

trustees go outside the stated purposes of such a fund, "a court of equity can always intervene to control such an unreasonable exercise of discretion." (*Forrish v. Kennedy* (Pa. Sup. Ct., 1954), 105 A. 2d 67, 25 C. C. H. Labor Cases, Par. 68,434, cited in Final Report of Subcommittee on Welfare and Pension Funds, Senate Committee on Labor and Public Welfare, 84th Cong., 2d Sess. (1956), pp. 65-66.)

Thus, in Labor-Management trust funds, as in other trusts, the "discretionary power conferred upon a trustee is presumed not to be left to his arbitrary discretion, but may be controlled by the proper court." (Cal. Civ. Code, §2269.)

Such being the case, the question arises whether the stated purposes of the Joint Industry Board Fund trust agreement involved herein authorize payment of any money or other thing of value to the union by the employers.

Appellants assert that "the purposes specified include the expenditure of assets of the fund for the purposes of *defraying the cost of at least some activities normally carried on by the union*" (App. Br. p. 13), namely, "settling disputes, arbitrating, and administering an apprenticeship program." (App. Br. p. 5, see also pp. 24-26.)

Insofar as the administration of an apprenticeship program is concerned, Appellants cite no authority for the proposition that this is a union function normally paid for by the union.

Faced with a "steadily decreasing number of labor organizations maintaining an apprenticeship system" so that by 1936 most national unions did *not* provide in their constitutions or agreements for the training of apprentices

(see Slichter, *Union Policies and Industrial Management* (1941), pp. 9-10; 5 *Industrial and Labor Relations Review,* p. 50; *Handbook of American Trade Unions,* U. S. Bureau of Labor Statistics Bulletin No. 618 (1936); Motley, *Apprenticeship in American Trade Unions,* pp. 53 *et seq.*). Congress decided in 1937 that "the training of all-around skilled workers is a matter of concern to all of the people" and "therefore passed an act authorizing the Secretary of Labor to set up standards to guide industry in employing and training apprentices; *to bring management and labor together to work out plans for the training of apprentices;* to appoint such national committees as needed; and to promote general acceptance of the standards and procedures agreed upon." (*The National Apprenticeship Program,* U. S. Dept. of Labor. Apprentice-Training Service (1947), p. 1; emphasis added. See Public Law 308, 75th Cong.; 50 Stats. 664-665; 29 U. S. C., §§50-50b, incl.)

To carry out these functions, the Apprentice-Training Service was established and the Federal Committee on Apprenticeship, composed of representatives of Management, Labor and interested Government agencies, was appointed. In the Construction Industry, a General Committee on Apprenticeship, consisting of leading representatives of contractors' associations and labor organizations, acts as a coordinating body and promotes the development of national and local apprentice training programs. (*Ibid.*)

In California, the State Legislature adopted the Apprentice Labor Standards Act of 1939 (Stats. 1939, Ch. 220, pp. 1472-1476; Cal. Labor Code, §§3070-3090 incl.), creating a tripartite Apprenticeship Council, composed of representatives of employers, employees, and the

general public, and authorizing the selection of *"joint apprenticeship committees"* by employers or employer associations and employee organizations on a State-wide or local area basis.

The administration of such a "joint apprenticeship program" and establishment of such "Apprenticeship Standards" by the Joint Industry Board pursuant to the Trust Agreement herein [Par. A, subp. 4; R. 30] does not constitute taking over some of the functions of the union, as contended by the Appellants. (App. Br. p. 5.)

It is undisputed that the statutory definition of collective bargaining under Section 8(d) of the amended National Labor Relations Act (29 U. S. C., §158(d)) includes the initial handling of grievances and disputes related to the administration and enforcement of an existing collective bargaining agreement. (See *N. L. R. B. v. F. W. Woolworth Co.* (1956), 352 U. S. ....., 1 L. ed. (2d) 235, reversing 235 F. 2d 319, which denied enforcement of 109 N.L.R.B. 196.)

Likewise, it is undisputed that union functions include "dealing with employers concerning grievances, labor disputes . . ." and the like (29 U. S. C., §152(5)), "with the end in view of arriving at a reasonable and amicable adjustment of such matters." (*Yellow Cab Operating Co. v. Taxi-Cab Drivers Local Union* (D. C. Okla., 1940), 35 Fed. Supp. 403.)

Adjustment of grievances and disputes by the union through collective bargaining with the individual employers is wholly separate from the functions of *conciliation or mediation* [Trust Agreement, Par. A-2; R. 30] and *arbitration* [Trust Agreement, Par. A-3; R. 30] through the facilities provided by the Joint Industry Board.

With respect to this type of adjustment of grievances and disputes through collective bargaining conferences, the National Labor Relations Act as amended expressly provides that:

> (1) "an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay" (Section 8(a)(2); 29 U. S. C. §158(a)(2)) thus authorizing "payment not only to individual employees, but also to employees acting in a representative capacity in conferring with the employer." (House Conf. Rept. No. 510, 80th Cong., 1st Sess., p. 45; see also *Matter of Remington Arms Co., Inc.* (1945), 62 N.L.R.B. 611, and *Coppus Engineering Corp. v. N. L. R. B.* (C. A. 1st, 1957), ... F. 2d ....., 39 L.R.R.M. 2315.)
>
> (2) "any individual employee or a group of employees shall have the right to present grievances to their employer and have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further,* that the bargaining representative has been given opportunity to be present at such adjustment." (Section 9(a); 29 U. S. C. §159(a); House Conf. Rept. No. 510, 80th Cong., 1st Sess., p. 46; see *Hughes Tool Co. v. N. L. R. B.* (C. A. 5th, 1945), 147 F. 2d 69.)

In adopting the statutory definition of collective bargaining contained in Section 8(d), relied upon by Appellants herein (App. Br. p. 25), the Conference Committee specifically noted that the Taft-Hartley bill in its final form "omits from the Senate amendment words that were contained therein which might have been construed to

require *compulsory settlement of grievance disputes* and other disputes over the interpretation or application of the contract." (House Conf. Rept. No. 510, 80th Cong., 1st Sess., p. 35; emphasis added.)

While the employer's duty to bargain collectively with the union includes the handling of grievances and disputes by meeting and conferring in good faith in an effort to deal with their merits, Section 8(a)(5) of the Act (29 U. S. C. §158(a)(5)) does not require the submission of the grievance or dispute to arbitration as the final step of the grievance procedure. Thus, in *Matter of Textron Puerto Rico (Tricot Division)* (1953), 107 N.L.R.B., No. 142, the National Labor Relations Board declared:

> ". . . the record establishes at the most that [the Employer] refused to comply with the Union's request that [the Employer] submit to arbitration the dispute arising out of that discharge. Whether or not such refusal constituted a breach of the collective bargaining agreement, it did not, in itself constitute a violation of Section 8(a)(5) and (1) of the Act. Accordingly, we shall dismiss the complaint."

Section 201 of Title II of the Labor Management Relations Act (29 U. S. C. §171) expressly distinguishes between "the processes of conference and collective bargaining between employers and the representatives of their employees," on the one hand, *and* "facilities for conciliation, mediation and voluntary arbitration" or "such methods as may be provided for in any applicable agreement for the settlement of disputes" and "the final adjustment of grievances," on the other hand.

Section 203 of that same Title of the 1947 Act declares that "Final adjustment by a method agreed upon by the parties" is "the desirable method for settlement of grievance disputes." (29 U. S. C. §173(d).) The Senate version of the Act authorized the Federal Mediation Service to seek to induce the parties to submit such disputes to voluntary arbitration and provided for payment by the United States of not to exceed $500 as a contribution to *defray the cost of such an arbitration proceeding,* but this feature was eliminated in conference. (House Conf. Rept. No. 510, 80th Cong., 1st Sess., p. 62; S. Rept. No. 105, 80th Cong., 1st Sess., p. 29.)

In the case of so-called jurisdictional disputes, Congress adopted the same policy favoring resort by the parties to "agreed upon methods for the voluntary adjustment of the dispute" (Sec. 10(k); 29 U. S. C. §160(k)), and, in conference, eliminated the provisions of the Senate version which authorized the National Labor Relations Board to appoint an arbitrator to decide the issues. (House Conf. Rept. No. 510, 80th Cong., 1st Sess., p. 57; Senate Rept. No. 105, 80th Cong., 1st Sess., p. 27.)

In accordance with Title II of the Labor Management Relations Act, the Federal Mediation and Conciliation Service has recognized "voluntary arbitration as the private judicial system of the parties," so that employers and unions "must assume broad responsibility for the success of the particular arbitration procedures they have chosen." The Service has concluded that "Voluntary arbitration is a supplement, in appropriate cases, to free collective bargaining" frequently constituting "a desirable alternative to economic strife." (*"Statement of Arbitration Functions and Facilities"* (1948), and *"Arbitration Policies, Functions, and Procedures"* (1954), of the Fed-

eral Mediation and Conciliation Service, summarized in 5 C. C. H. Labor Law Reports at page 51,042. See also *"Grievance Mediation under Collective Bargaining,"* in 9 *Industrial and Labor Relations Review,* 200, 204.)

From the foregoing it may be seen that the District Court herein was fully justified in concluding, as it did, that the procedures for disputes settlement and joint arbitration contemplated by the Joint Industry Board Trust Agreement are "auxiliary to collective bargaining procedures" and "go beyond them" so that in this respect, as in all others "The Joint Industry Board is not a part of the union." [R. 46-47.]

There is no support in this record for Appellants' claim that before the establishment of the Joint Industry Board "the union has handled all disputes and grievances arising out of the contract *at its own expense,* including arbitration." (App. Br. p. 25.) Neither does the Trust Agreement provide in Paragraph F [R. 32], or anywhere else, as claimed by Appellants, that the employers shall pay "the entire cost of 'settlement of any and all disputes' . . . and the cost of arbitration. . . ." (*Ibid.,* p. 26.)

A reasonable construction of the purposes of the Joint Industry Board Fund as enumerated in the Trust Agreement is that the Joint Board will "aid in the settlement of any and all disputes"; "administer a joint arbitration committee"; and "provide further arbitration procedures" [R. 30] as a supplementary or auxiliary procedure to free collective bargaining procedures between the union and the individual employers.

The District Court adopted such a reasonable construction when it found that the Joint Industry Board's "governing agreement expressly provides for the separate

character of the Board from either of the parties, and expressly preserves their duties and relationships with respect to each other and each of them with respect to their members." [R. 47.]

The union's function in handling disputes and grievances as the collective bargaining representative of its membership was not *"transferred* to the Joint Industry Board" (Cf. App. Br. p. 25), nor does the payment of expenses in connection with separate Joint Industry Board functions amount to "paying the cost of a portion of the functions normally paid for by the union" comparable to payments of "rent for the union hall and offices" or of "the salaries of their officers," as Appellants contend. (Cf. App. Br. p. 26.)

4. Beneficiaries of the Trust.

The chief difference between an ordinary private trust and a beneficial fund or charitable trust is that in the latter case the beneficiaries are unspecified. (*Bauer v. Myers* (C. A. 10th), 244 Fed. 902, 911.)

This "element of indefiniteness in the beneficiaries of a charitable trust is not only not an objection to its validity, but, as a rule, is of the essence of all charitable trusts of a public or *quasi*-public character." (*Collier v. Lindley, supra,* 203 Cal. at p. 652; see also *Estate of Henderson, supra,* 17 Cal. 2d at p. 857; *People v. Cogswell, supra,* 113 Cal. at pp. 136-137, citing *Russell v. Allen,* 107 U. S. 163; and *Faye v. Howe* (1902), 136 Cal. 599, 601, quoted with approval in *Estate of Bunn, supra,* 33 Cal. 2d at p. 901. The rule is also discussed in *Rest. Trusts,* §375 and 30 Cal. L. Rev. 218.)

The unascertained beneficiaries of such a trust must constitute a sufficiently large class of persons so that the

community has a stake in the enforcement of the trust and there is a public interest to be served thereby. Those benefited by the trust may include such an undefined segment of the population as "the working classes" (*Collier v. Lindley, supra*), or a more definite group such as members of particular labor organizations or employees of particular major employers or major industries. (*Estate of Tarrant, supra;* see *Annotation, supra,* 28 A. L. R. 2d at p. 430.)

The fact that there are no specific persons interested in such a trust as individually-named beneficiaries "does not place it beyond the protection of a court of equity." The enforcement of the requirements of the charitable trust and an accounting of the corpus "may be compelled by the Attorney General." (*Estate of Bunn, supra,* 33 Cal. 2d at p. 904; *People v. Cogswell, supra,* 113 Cal. at p. 136.)

The general rules as to enforceability of beneficial charitable trusts which admittedly are applicable to pension or medical and hospitalization trusts established by collective bargaining agreements (see App. Br. pp. 17 and 19) have been well summarized by the Final Report of the Senate Subcommittee on Welfare and Pension Funds (*supra,* pp. 64-66) in the following fashion:

> (1) "If it may be assumed that welfare and pension trusts arising out of collective bargaining are, in fact, in the nature of beneficial charitable trusts, then enforcement of the rights of the beneficiaries has been a responsibility of the State since 1601 when the Statute of Charitable Uses was enacted by Parliament (43 Eliz., Ch. 4)."
>
> (2) In some States, "an action may be brought by the attorney general upon his own information

or upon complaint of any interested party (which would include a beneficiary or beneficiaries) for the enforcement of a charitable trust."

(3) "It is generally held that a person who has a special interest in the performance of a charitable trust can bring an action for its enforcement." (Citing Scott on Trusts, p. 2054.)

(4) The "States already have ample authority to act through their attorneys general following the commission of a breach of trust or the commission of any act of malfeasance in the administering of trust funds located within the State."

(5) "Federal courts also have warned that abuses . . . will not be tolerated." (Citing *Upholsterers' International Union v. Leathercraft Furniture Co., supra.*)

(6) Courts "will look with favor upon the petition of a beneficiary even though his right to benefits has not vested."

(7) The "purposes of a trust cannot be frustrated at the whim and caprice of the trustees" and "beneficiaries of welfare and pension trust funds established through collective bargaining have a means of protecting their rights and interests through the courts."

Appellants herein concede that in the *Essex* case, *supra,* 216 F. 2d 410, involving a pension trust, "it would be impossible for the trustees to apply any of the moneys in the trust for the benefit or advantage of the *union as such* without violating the specific terms and provisions of the trust" (App. Br. p. 5) and likewise in the *Upholsterers* case, *supra,* 82 Fed. Supp. 570, involving a union-administered health and welfare fund, "no part of this

fund could be diverted to the benefit or advantage of the union as such *without violating the trust agreement itself.*" (*Ibid.*, p. 7.)

In the case of a pension trust, as in the *Essex* case, or a medical and hospitalization trust, as in the *Upholsterers* case, Appellants recognize that the employees as beneficiaries could have gone to a Court of Equity to enforce their rights and prevent a diversion of the trust fund to the union. (*Ibid.*, pp. 17 and 19.)

The decision of the District Court here under review properly held that this same doctrine applies to the Joint Industry Board. Although "chosen half and half by the employers' association and this union," the individuals so designated "when set up as a board, as they were in this case," were declared to be "not acting as representatives of either union or employers" but rather as "trustees of a fund" with "fiduciary duties" enforceable by a court of equity. [R. 46.]

Appellants are not at all accurate when they state that "There were no beneficiaries of the Joint Industry Board Fund except the *union* itself and the *employer association.*" (App. Br. p. 17.)

The Trust Agreement of the Joint Industry Board Fund discloses on its face that it provides for:

> (a) assistance in settlement of disputes for the benefit of Union members, Employer's Association members and "all other employers of union members who are signatories to agreements with the union" [Par. A-2; R. 30];
>
> (b) apprenticeship standards and training for the benefit of "persons of good moral character, ambition and competency" [Par. A-4; R. 30];

(c) assistance and aid in maintaining a "high degree of skill" for the benefit of those persons engaged in "the Heating and Sheet Metal Industry" in Northern California [Par. A-5; R. 30; Cf. App. Br. p. 19];

(d) a forum for discussion of methods of joint cooperation for the benefit of "Management and Labor" in the said Industry [Par. A-5; R. 30-31; Cf. App. Br. p. 19];

(e) counsel, advice and other assistance to "individual members of the Union and all employers who are signatories hereto" in the said Industry [Par. A-5; R. 31; Cf. App. Br. p. 20];

(f) liaison with "representatives of public and quasi-public bodies or groups or associations in the Construction Industry or allied fields" for the benefit of persons engaged in the Heating and Sheet Metal Industry in the Northern California counties [Par. A-6; R. 31];

(g) advocacy and promotion of legislation "beneficial" to persons engaged in "the Heating and Sheet Metal Industry" of the State of California [Par. A-6; R. 31; Cf. App. Br. pp. 20 and 24];

(h) dissemination of public information and public relations activities for the benefit of persons engaged in "the work of the Heating and Sheet Metal Industry" [Par. A-6; R. 31; Cf. App. Br. p. 23].

We submit that the individual employees, employers, and applicants for employment now engaged or hereafter engaged in the "Heating and Sheet Metal Industry" in Northern California are the direct beneficiaries of this

Fund and constitute a sufficiently broad class of persons within the community with a special interest in the performance of this trust to permit enforcement of the express trust provisions by the courts to protect their interests.

Even if there were "no class of persons particularly interested in such a trust," Appellants would not be justified in concluding that "There was *no one* to challenge whatever disposition might be made of the monies in the fund." (App. Br. p. 20.) Such a trust is affected with a public interest which can be enforced by the Attorney General of the State of California who may secure an accounting of all expenditures so that Appellants' "concern that there is *no one* 'to keep the trustee honest' has no substantial foundation." (*Estate of Bunn, supra*, 33 Cal. 2d at p. 904; emphasis added. As to the remedy of an accounting, Cf. App. Br. p. 7, par. 2.)

Under all of the foregoing circumstances (regarding the establishment of the trust fund; its enumerated purposes; the powers, duties and fiduciary obligations of the trustees; and the beneficial interest of the individual employees and employers in the fulfillment of the purposes of the trust fund by the trustees in accordance with the requirements of the Trust Agreement), the District Court could not "hold that the payments in question are payments 'to any representative' . . ." and therefore properly held that the "union members of the Joint Industry Board, in that capacity, are not 'representatives' of the employees within the meaning of 29 U. S. C. 186." [R. 48.]

V.

In the Absence of Any Actual or Threatened Violations of Section 302(a) and (b), the District Court Lacked Jurisdiction to Grant Any Relief to Appellants.

Section 302(e) of the Labor Management Relations Act as set forth in 29 U. S. C. §186(e) provides that—

> "The district courts of the United States . . . shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of sections 101-115 of this title."

Congress thus authorized injunctive relief against violations of Section 302(a) and (b) of the Taft-Hartley Act, notwithstanding the restrictions upon the equitable jurisdiction of the District Court in "labor disputes" contained in the provisions of Sections 6 and 20 of the Clayton Act (15 U. S. C. §17 and 29 U. S. C. §52) and the provisions of the Norris-LaGuardia Anti-Injunction Act (29 U. S. C. §§101-115).

As District Judge Kirkland clearly explained the limited jurisdiction conferred by Section 302(e), in *Dunbar Company v. Painters District Council, supra* (D. C. Dist. Col., 1955), 129 Fed. Supp. 417:

> "Modifying the general denial to federal courts of injunctive powers in labor disputes, Congress has seen fit in this Act to open the door just a bit and to define a narrow path for federal courts to trod. . . .

"So there is this very narrow opening in the theretofore solid wall of denial of the power of injunction in cases of labor disputes. . . .

"To enforce it [Section 302] a criminal penalty was attached, because . . . there was potential vice in these funds not being properly deposited, not being properly supervised, not being properly audited, and in fact they could become a slush fund, they could become the source of crime, embezzlement, and they might be used for many improper things. . . .

"That language [Section 302(a) and (b)] was very deliberately intended to prevent kickbacks, prevent bribes, prevent things which make for labor racketeering. And . . . beyond the penalties which are purely criminal, there could be injunctive powers for quick and speedy remedy."

In the absence of actual or threatened payments or agrements for payments to a "representative" of his employees by one or more employers, in contravention of Section 302(a) and (b), Congress did not intend to confer general equitable jurisdiction upon the District Courts to grant injunctive relief by virtue of any labor dispute arising over employer opposition to and criticisms of a trust fund established through collective bargaining. (Compare *Statements of Senators Thomas and Pepper,* 5/7/47, 93 Cong. Rec. 4680, and *Statement of Senator Morse,* 5/8/47, 93 Cong. Rec. 4751.)

Conclusion.

The defendant Joint Industry Board of the Heating and Sheet Metal Industry of Marin, Sonoma, Mendocino, Lake, Napa and Solano Counties is a beneficial trusteeship for enumerated purposes affected with a public interest, established for the benefit of individuals engaged as employers, journeyman employees and apprentice employees in said Industry.

The defendant W. R. White in his capacity as one of six persons appointed by defendant Local No. 75, who, together with six other persons appointed by Associated Heating and Sheet Metal Contractors, Inc., administer the Joint Industry Board Trust Fund, is a trustee for a "charitable trust" with appropriate fiduciary obligations, and subject to the supervision and control of a court of equitable jurisdiction.

Neither said Joint Industry Board, nor any of its twelve members in their capacities as joint trustees, are "representatives" of any employees of Appellants within the meaning of Section 302 of the Labor Management Relations Act, 1947.

Financial contributions to said Trust Fund by the eight San Francisco Sheet Metal contractors among the Appellants herein (pursuant to their agreement with defendant Local No. 104 to be governed by the "established working conditions" of defendant Local No. 75 when employing members of Local No. 104 in the six Northern California Counties) do not constitute payments of " 'any money or other thing of value' to any 'representative' of their employees" in violation of Section 302(a).

The receipt or acceptance of such sums from these eight plaintiff employers by the defendant Joint Industry Board was not made "unlawful" by Section 302(b).

The making of such financial contributions by some of the Appellants and the receipt thereof by one of the Appellees did not constitute a crime made punishable by Section 302(d).

In the absence of any violations of Section 302(a), (b), and (d), no jurisdiction exists to grant an injunction against such payments by virtue of Section 302(e). Jurisdiction to grant the relief sought by Appellants herein was precluded by the Norris-LaGuardia Act. (29 U. S. C. §§101-115.)

Under the undisputed facts and circumstances of this case, the orders of the District Court granting defendants' motion for summary judgment and denying plaintiffs' motion for summary judgment were free from error, and the summary judgment of the District Court dismissing plaintiffs' complaint and denying injunctive relief, as prayed for, should be affirmed.

DATED: Los Angeles, California, March, 1957.

Respectfully submitted,

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By ROBERT W. GILBERT,

Attorneys for Appellees.

No. 15,355

IN THE

United States Court of Appeals

For the Ninth Circuit

SHEET METAL CONTRACTORS ASSOCIATION OF SAN FRANCISCO, a California corporation, et al.,

Appellants,

vs.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, et al.,

Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division.

REPLY BRIEF ON BEHALF OF APPELLANTS.

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The legal issues have been joined, so to speak, by the able and carefully prepared brief filed on behalf of appellees. The questions to be decided by this Court have been narrowed to relatively few and, on balance, we respectfully believe and submit that they should be resolved in favor of appellants and the judgment below reversed.

WERE APPELLANTS EMPLOYERS OF EMPLOYEES EMPLOYED IN AN INDUSTRY AFFECTING COMMERCE?

The first question presented by the brief on behalf of appellees is whether appellants are employers of employees employed in an industry *affecting commerce*. This point is raised in various ways. At page nine of appellees' brief the question is specifically set forth. At page seven of appellees' brief attention is called to the fact that only eight of the plaintiff employers (Ace; Apex; Gilmore; Western Plumbing; Atlas; Scott; Valley; Sheet Metal; and Otis) have carried on jobs in the "above-named counties" over which Local 75 asserted jurisdiction.

LEGAL PRINCIPLES INVOLVED.

The question whether employers employ employees who are "employed in an industry affecting commerce" and are thus subject to Section 303 of the Act is closely related to the question whether the National Labor Relations Board has the jurisdiction or authority to prevent such employers from engaging in unfair labor practices.

Section 10 of the Act (LMRA 1947), entitled "Prevention of Unfair Labor Practices", reads in part as follows:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) *affecting commerce.*"

The words "affecting commerce" as used in Section 10 of the Act should have the same meaning as the words "affecting commerce" have in Section 302. In a substantial line of decisions the Courts have upheld the assertion of jurisdiction by the National Labor Relations Board over employers having varying amounts of interstate commerce subject only to the "de minimis rule".

In *N.L.R.B. v. Fainblatt,* 306 U.S. 601, the Court said (607):

> "Examining the Act in the light of its purpose and of the circumstances in which it must be applied, we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which courts would apply the maxim de minimis."

An example of a "de minimis" case is:

Groveman v. Electrical Workers Union (C.C.A. 10) 177 Fed. 2d 995, which involved an action for damages resulting from a secondary boycott brought under Section 303 of the Act. The District Court dismissed on the grounds of de minimis because the suit involved the tie-up of a building job and it was shown that only $6,000 of materials came to this job in interstate commerce. The Circuit Court of Appeals affirmed, citing the *Fainblatt* case (supra).

On the other hand, the Board has asserted jurisdiction and the Courts have approved in the following cases:

Wayside Press Inc. v. N.L.R.B. (C.C.A. 9) 206 Fed. 2d 862. The company supplied goods and services of a value in excess of $50,000 per annum to firms which realize annual income from sources outside the State of California in excess of $25,000.

This was held sufficient.

Eichlay Corp. v. N.L.R.B. (C.C.A. 3) 206 Fed. 2d 799. Here a construction company transported about $20,000 worth of small tools over state lines and brought in from outside the state four key men.

This was held sufficient even though the $20,000 represented only two per cent of the total value of the contract for the project.

The Court quoted from the opinion in *Polish National Alliance v. N.L.R.B.,* 322 U.S. 643, as follows:

> " 'Whether or no practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. *Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce.*' (Emphasis supplied.)"
>
> "Moreover, as this Court has observed in another case involving the construction industry:
>
> " 'One small stoppage may not have an immediate perceptive effect upon the flow of the whole stream. But many small stoppages will have such effect * * * the power to regulate is not lost be-

cause of the small size of any individual contribution.' Shore v. Building and Construction Trades Council, 173 F. 2d 678, 681 (23 LRRM 2417) (3rd Cir. 1949.)"

Another recent case is *Capital Service Inc. v. N.L.R.B.,* (C.C.A. 9) 204 Fed. 2d 848. Here jurisdiction was asserted over a bakery conducting essentially a local business where the manufacturer annually received $205,000 worth of materials *directly and indirectly* from sources outside the state.

The Court affirmed.

N.L.R.B. v. Reed (C.C.A. 9) 206 Fed. 2d 184. Here jurisdiction was asserted over a local builder who annually did over $50,000 worth of business in services for public utilities and for establishments which produce or handle goods for out-of-state shipment and who did work under a sub-contract for a company constructing an enterprise for which large quantities of materials were brought from out of state even though at the time of the unfair labor practice the builder was engaged in local construction work.

The Court affirmed, saying:

"The Board's decision to take jurisdiction over a particular industry may not be challenged unless in so doing it has abused its discretion or exceeded its authority under the Act or under the constitution."

N.L.R.B. v. Cantrall (C.C.A. 9) 201 Fed. 2d 853. The Court upheld the Board's assertion of jurisdiction

over two contractors engaged in local work of removal and installation of machinery for a contract amount of $59,000 for a company in interstate commerce.

The Court said:

> "The Act does not confine the jurisdiction of the Board to any specific amount of commerce that must be transacted before it has jurisdiction."

Finally, in *N.L.R.B. v. Denver Building Trades Council,* 341 U.S. 675, the Supreme Court of the United States upheld the action of the Board in taking jurisdiction, saying:

> "The Board here found that their effect was sufficient to sustain its jurisdiction and the Court of Appeals was satisfied. We see no justification for reversing that conclusion.
>
> "The Board found that, in 1947, Gould & Preisner, purchased $85,560.30 of raw materials of which $55,745.25, or about 65%, were purchased outside of Colorado. Also, most of the merchandise it purchased in Colorado had been produced outside of that State. While Gould & Preisner performed no services outside of Colorado, it shipped $5,000 of its products outside of that state. Up to the time when its services were discontinued on the instant project, it had expended on it about $315 for labor and about $350 for materials. On a 65% basis, $225 of those materials would be from out of State. The Board adopted its examiner's finding *that any widespread application of the practices here charged might well*

result in substantially decreasing the influx of materials into Colorado from outside the State and it recognized that Gould & Preisner's annual purchase of over $55,000 of such materials was not negligible." (Emphasis supplied.)

"The Board also adopted the finding that the activities complained of had a close, intimate and substantial relation to trade, traffic and commerce among the states and that they tended to lead, and had led, to labor disputes burdening and obstructing commerce and the free flow of commerce. The fact that the instant building, after its completion, might be used only for local purposes does not alter the fact that its construction, as distinguished from its later use, affected interstate commerce.

* * * * * * *

"The same jurisdictional language as that now in effect appeared in the National Labor Relations Act of 1935 and this Court said of it in that connection:

" 'Examining the Act in the light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which courts would apply the maxim de minimis,' Labor Board v. Fainblatt, 306 U.S. 601, 607 (4 LRR Man. 535); see also Labor Board v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1 LRR Man. 703).

"The maxim de minimis non curat lex does not require the Board to refuse to take jurisdiction of the instant case."

In applying the jurisdictional standards to this case the Stipulation of Facts set forth at page 17 of the Record recites as follows:

> "1. During the calendar year 1955 plaintiff employers collectively made direct purchases of goods and materials from outside the State of California of a value in excess of $500,000; and that plaintiff employers collectively made purchases in California through local dealers of goods and materials originating outside the State of California of a value in excess of $1,000,000; and plaintiffs collectively rendered services and furnished materials outside the State of California having a value of approximately $125,000.
>
> "2. Plaintiff employers are, and for several years last past, have been members of Sheet Metal Contractors Association of San Francisco. For several years last past plaintiff employers, and each of them, have been members of a multi-employer group for purposes of collective bargaining, and during said period plaintiffs, and each of them, have authorized Sheet Metal Contractors Association of San Francisco to negotiate and enter into a collective bargaining contract with Local Union No. 104 as the representative of the employees of plaintiffs, and for several years last past Local Union No. 104 has negotiated and entered into collective bargaining agreements with Sheet Metal Contractors Association of San Francisco."

In *Insulation Contractors of Southern California, Inc.,* 110 N.L.R.B. No. 105, 35 LRRM 1079, the National Labor Relations Board reaffirmed its rule of *combining* the interstate commerce of *all members of*

a multi-employer bargaining association for the purpose of determining whether or not to assert jurisdiction, saying:

> "Although the Board has recently announced new minimum requirements for the assertion of its jurisdiction, we will adhere to our past practice of considering all association members who participate in multi-employer bargaining as a single employer for jurisdictional purposes. Accordingly, under the new standards, in determining whether to assert jurisdiction, the Board will continue to consider the totality of the operations of the Association members. As the members in the aggregate ship goods and do business outside the State of California valued in excess of $50,000, we find that it will effectuate the policies of the Act to assert jurisdiction herein."

Although appellees stress the fact that only eight of appellant employers were compelled to make payments into the Joint Industry Board Fund of Local Union No. 75, it is obvious that all of appellant employers could not be successful bidders on the same jobs at the same time, and because *all* of appellant employers join as plaintiffs to resist compulsory payments into such Joint Industry Board Fund it is obvious that a labor dispute, which could result in tying up all work of such employers, would have a direct and substantial effect on interstate commerce.

It therefore follows that plaintiffs are employers of employees employed in an industry "affecting commerce."

WAS LOCAL UNION NO. 75 A REPRESENTATIVE OF THE EMPLOYEES OF APPELLANTS?

The next question raised by appellees is whether Local Union No. 75 is a representative of the employees of appellants. If Local Union No. 75 is not a representative of the employees of appellants appellees argue that payments to Local Union No. 75 do not violate the statute.

The question is posed at page 10 of appellees' brief which reads in part as follows:

> "3. Had any such defendant 'representative' of any employees of any such plaintiff employer violated or attempted to violate Section 302 of the Taft-Hartley Act which makes it 'unlawful for any *employer* to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any *representative or any of his employees*' and 'for any *representative of any employees* * * * to receive or accept or to agree to receive or accept from the *employer or such employees* any money or other thing of value'?"

Again, at page 5 of their brief appellees state as follows:

> "Pursuant to a valid collective bargaining agreement executed on or about June 10, 1955, between various employers, *other than plaintiffs,* doing business as sheet metal contractors in the Counties of Marin, Sonoma, Mendocino, Lake, Napa and Solano, California, represented by the Associated Heating and Sheet Metal Contractors, Inc., and defendant Local No. 75 (Stipulation of Facts, Par. 4 R. 18; and Ex. 'B' thereto, R. 26-29) there has been created the 'Joint Industry

Board,' defendant herein *composed of an equal number of employer and union trustees,* who function pursuant to a formal 'trust agreement'. (Stipulation of Facts, Pars. 6-8, incl., R. 18-19; and Ex. 'C' thereto, R. 29-41.)"

Finally, appellees state at page 35 of their brief:

"Assuming for sake of argument that the eight specific plaintiff employers who made the questioned payments to the Joint Industry Board Fund herein 'are engaged in an industry affecting commerce within this district' and 'are employers of employees engaged in an industry affecting commerce within the meaning of Section 302' as alleged (see Complaint, Par. IV, R. 7; cf. Answer, Par. IV, R. 12; see Stipulation of Facts, Par. 1, R. 17 as to collective commerce data for all 28 plaintiff employers), the question still remains as to which of defendants are the 'representatives' of their employees.

"The Complaint herein alleged that 'Said International Association, Local Union No. 104, Local Union No. 75 and W. R. White are representatives of the employees of plaintiffs.' (R. 8.) No such allegation is made as to the defendant Joint Industry Board."

These questions are readily answered. The record plainly shows that both Local Unions No. 104 and No. 75 entered into collective bargaining contracts with employer groups covering work within the *territorial* jurisdiction of each Local Union. Local Union No. 104 had territorial jurisdiction over work performed in the City and County of San Francisco. (R. 22.)

Local No. 75 had territorial jurisdiction over work in Marin, Sonoma, Mendocino, Lake, Napa, and Solano Counties. (R. 26.) Each union signed a "standard form of agreement" (R. 21) expressly covering the contingency of work being performed "outside of the territorial jurisdiction of the Union".

Among other things appellants' employees, who are members of Local Union No. 104, are "deemed" to have complied with Article IV of the standard agreement by "acquiring and retaining membership in the *said Local Union in whose jurisdiction such employee performs work*" (in this case Local No. 75) (Art. IV) (R. 22) whenever they perform work within the territorial jurisdiction of such Local Union.

Article VII of the standard agreement further provides that "the Employers shall be otherwise *governed by the established working conditions of said Local Union*". (R. 24.) (In this case Local Union No. 75.)

Attached to and made a part of the Local No. 75 contract is an Addenda reading as follows (R. 27):

> "17. Disputes:
>
> "It is hereby agreed and understood that the Working Rules and conditions of Local Union No. 75 are specifically referred to and made a part of this agreement. *Any disputes arising out of this agreement shall be referred to the Joint Industry Board.* The provisions for the settling of all disputes as set forth in the 'Trust Agreement' of the Joint Industry Board shall be substituted for Article IX (nine), Sections one (1) through three (3). (Emphasis supplied.)

"The Joint Industry Board shall not alter or amend the Bargaining Agreement without a majority vote of both the Union and the Association membership."

Also included in said Addenda is paragraph "C", reading as follows (R. 29):

"The Trust Agreement creating the Joint Industry Board of the Heating and Sheet Metal Industry of Marin, Sonoma, Mendocino, Lake, Napa and Solano Counties is specifically referred to and made a part of this Agreement."

The Joint Industry Board agreement provides in part as follows (R. 40):

"The Board shall have the power and authority to study and correct improper working conditions and shall decide all controversies or disputes arising under this agreement. Decision of the Board shall be made by a majority vote of the Union members, together with a majority of the Employer members, based on full membership of the Board. In the event that the Board is unable to reach agreement, the members thereof shall choose an impartial person who shall act as arbitrator. In the event that the members of the Board are unable to reach agreement on an arbitrator within ten days they shall request the President of the University of San Francisco to designate an arbitrator. The decision of the arbitrator shall be final and binding on all parties."

If a dispute arises on any of appellants' jobs within the territorial jurisdiction of Local Union 75 it will be handled by Local Union 75, or if necessary, by the

Joint Industry Board. The dispute will *not* be handled by Local Union 104.

Because the employees of appellants are "deemed" to be members of Local Union No. 75 when working within its territory, and because the employers are "governed" by Local Union No. 75's established working conditions when working in such territory, and because all disputes and controversies arising when working under such contract must be decided by the Joint Industry Board (R. p. 40), and because "Said Joint Industry Board (is) composed of an equal number of employer and union representatives" (R. 29) (referring to Local Union No. 75) it follows that Local Union No. 75 is the representative of the employees of appellants while they are working within Local Union No. 75's territorial jurisdiction.

Any other conclusion would make it ridiculously simple to circumvent Section 302. Local No. 104 could strike to compel its employers to make payments to Local 75, and Local 75 could strike to compel its employers to make payments to Local 104. According to appellees this would not violate the Act because employers are not making payments to representatives of *their* employees.

We think that this Court will agree that the statute may not thus easily be evaded and circumvented.

DO PAYMENTS TO THE JOINT INDUSTRY BOARD CONSTITUTE PAYMENTS OF MONEY OR OTHER THING OF VALUE TO LOCAL UNION NO. 75?

Having established:

1. That appellants are employers of employees employed in an industry affecting commerce; and that

2. Local Union No. 75 is a representative of the employees of appellants while such employees are working within the territorial jurisdiction of Local Union No. 75.

The next question is: Do payments to the Joint Industry Board constitute payments of money or other thing of value to Local Union No. 75?

Appellees argue, and the Court below found, that payments to the trustees of the Joint Industry Board Fund do not constitute payments of any money or thing of value to Local Union No. 75.

If this were a *true trust* for the *exclusive benefit of employees,* such as the pension trust involved in the *Essex* case (*United Marine Division v. Essex Transportation Co.,* 216 Fed. 2d 410), we would agree. A payment to trustees of a trust *exclusively* for the *benefit of employees* is not a payment to or for the benefit of the *representative* of such employees. As we pointed out, however, in our opening brief (pp. 4, 8) the Joint Industry Board trust is largely for the benefit of Local No. 75 and is intended to carry out a program which Local No. 75 wishes to carry out. Under these circumstances payment to the trustees of the Joint Industry Board constitute payments of money or a *thing of value* to Local No. 75.

Appellees also rely on the decision of the District Court for the Eastern District of Missouri in *Rice-Stix Co. v. St. Louis Health Institute,* 22 LRRM 2528 (see Appellees' Brief pp. 20 and 38).

We do not believe that appellees' brief accurately describes the situation when it states (Appellees' Brief p. 38) that the Health Institute was controlled by a *joint* board of trustees with the head of the union as president and the union business agent as secretary.

The Findings of Fact in that case read as follows:

"Findings of Fact.

"MOORE, District Judge: 1. That the St. Louis Labor Health Institute is a corporation, organized and existing under the laws of the State of Missouri realting to the benevolent, religious, scientific, fraternal-beneficial, educational, and miscellaneous organizations, created by a decree of the Circuit Court of the City of St. Louis, Missouri, entered on the 19th day of January 1945, and that from and after said date has been engaged in the operation of its functions in caring for the health of its members, that the dues of regular members of said St. Louis Labor Health Institute is based upon three and one-half (3½) per cent of members' wages or salary; groups or individuals other than members of labor unions may become members; labor unions enter into contracts with employers, whereby employers agree to pay to the St. Louis Labor Health Institute an amount equal to three and one-half (3½) per cent of the wages or salaries of their employees in the bargaining unit represented by the union as membership dues; for this the mem-

ber is to receive free medical and hospital care, with certain limitations; *neither the employer, nor the employee, nor the union has any right, title or interest in any moneys so paid, or in the funds of the St. Louis Labor Health Institute, or its control or management.* The only right, title or interest an employee, an employer, or a labor union has, is limited to medical and health services; the control of the St. Louis Labor Health institute lays in its membership, which elects a Board of Trustees, representative as far as possible of employers, employees, and the general public." (Emphasis supplied.)

This is no more than an employer agreeing to pay three and one-half (3½) per cent of employees' wages to Blue Cross or Permanente Hospital. The Health Institute is not jointly managed by employer and union trustees. The fact that the president and the business agent of the union are officers of the Health Institute does not render the payment a violation of Section 302 in view of the express declaration of the Court that "the only right, title or interest an employee, an employer, or a labor union has is limited to medical and health services", and that the union has no control over its management.

In the present case, on the other hand, while the purposes of the trust "are not entirely clear", as observed by the Court below, and are of "a rather large and vague nature", those that are enumerated, such as (1) the joint arbitration committee; (2) the joint apprenticeship program; (3) rendering assistance to

employers, *unions* and individuals in the industry for the purpose of effectuating high standards in the industry; and (4) to carry on publicity and lobbying for the benefit of the industry, are of interest to, and to the advantage of, the *union as such* as distinguished from the employees.

The *union* wishes to carry on certain activities and and seeks to compel the employers to pay for them by contributing to the Joint Industry Board. It is for this reason appellants believe that the payments of the Joint Industry Board are illegal.

Suppose that Local Union 75 had demanded that employers pay money *directly to the union* to enable the union to "maintain high standards in the industry", or to "carry on publicity and lobbying for the benefit of the industry". It cannot be doubted that such payments would directly violate Section 302.

The payments to a fund jointly owned and jointly controlled by the union are only slightly less *obvious* violations of the law. Vesting joint ownership and control of these funds in the union constitutes "a thing of value" given by the employer to a representative of his employees, contrary to the statute.

PURPOSES OF TRUST NOT PERMISSIBLE.

Appellees also argue earnestly that the purposes of the Joint Industry Board Trust are both laudible and socially desirable and were therefore not intended to be forbidden by the provisions of Section 302.

We do not believe that the clear language of Section 302 will permit such construction.

As was said by the Supreme Court of the United States in *U. S. v. Ryan,* 350 U.S. 299:

> "As the statute reads, it appears to be a criminal provision *malum prohibitum* which outlaws all payments with stated exceptions between employer and representative."

It would not be possible to make any clearer statement than the one above quoted, or, for that matter, to express more clearly the congressional intent than was done by the specific language of the statute.

It is interesting to note that Secretary of Labor Mitchell has sent to Congress certain proposed amendments to the Taft-Hartley Act one of which would make it clear that Section 302 does not prohibit employer contributions to jointly administered funds for apprentice training (an admittedly laudable and legitimate purpose). The comment in Labor Relations Reporter (39 LRR 361) reads as follows:

> "Apprentice Training Programs.
>
> "Some doubt has been cast on the legality of employer payments to jointly administered apprenticeship programs in the construction industry because of the existing language of Section

> 302 of the Taft Act. This section prohibits employers to pay money to any representative of his employees unless the payments come within certain stated exceptions. Since apprenticeship and training programs do not come within the exceptions, the question has arisen whether the joint trustees of a fund created to administer an apprenticeship program are 'employee representatives' within the meaning of Section 302. The joint committee's proposal would make it clear that employer payments to such funds are not banned by Section 302."

The "joint committee" referred to in the above quotation is a joint committee consisting of employer and union representatives established by Labor Secretary Mitchell to consider amendments to the Taft-Hartley Act. Their views coincide with the language of the Supreme Court above quoted and with the arguments we have presented and are contrary to the arguments advanced by appellees.

POWER TO REPLACE TRUSTEES.

Appellees point out at page 41 of their brief the legal and practical necessity of giving both employers and unions the power to replace trustees. We agree that this is so. If the trust were "exclusively for the benefit of employees and their families", such as a pension or hospital and medical benefits trust, no harm could result from the power to remove and replace trustees. The principals could not through the power

of removal and replacement force the trustees to apply any of the trust funds to the benefit of the union without violating the trust instrument and without violating their duties as trustees. Here, as we have previously said, the *combination* of the broad and vague purposes of the trust with the power of removal and replacement makes the so-called trustees mere agents or servants of their principals who hold legal title for the convenience of their principals.

TRUSTEES MERE SERVANTS.

Appellees seek to avoid the effect of the decisions in *Goldwater v. Altman,* 20 Cal. 408, and *Berneson v. Fish,* 135 Cal. App. 588, by attempting to classify the trust here involved as a charitable trust as distinguished from a business trust. We think, however, that it is clear from the facts that the trust is primarily for the benefit of Local Union 75 and is a convenient means of collecting the monies to carry out a program and plan of Local Union 75 however laudable that may be. Under these circumstances Local Union 75 is in fact one of the principals as well as the principal beneficiary and not merely one of a group of beneficiaries of a charitable trust.

PLUMBERS CASE.

A case very similar to, and in many respects identical with the case at bar, was recently decided by the United States District Court for the Southern District of California, Northern Division, entitled, *"Conditioned Air and Refrigeration Company, et al. v. Plumbing and Pipe Fitting Labor Management Relations Trust, et al."* (39 LRRM 2411, 32 Labor Cases (CCH ¶ 70,546). We will not quote from the opinion in that case as we believe that it should be read in its entirety. We have therefore set forth the opinion in full in an appendix to this brief. The Court there correctly concluded that payments to a trust for the same general purposes as those here involved was in violation of Section 302 of the Act.

CONCLUSION.

That case and the present case most certainly indicate that, unless this Court clearly indicates that Section 302 of the statute forbids it, many labor organizations will undertake to compel employers to deduct from wages of their employees and pay sums into a trust fund for an almost unlimited variety of purposes *not specified in Section 302.*

We believe that as interpreted by the Supreme Court in *U. S. v. Ryan* (supra) Section 302 forbids all payments to trusts jointly established by employers and labor organizations representing their employees *except* for the sole and exclusive benefit of the em-

ployees of such employers and for the purposes specifically enumerated in Section 302.

For the foregoing reasons it is respectfully submitted that the decision below be reversed.

Dated, San Francisco, California,
April 1, 1957.

Respectfully submitted,
ROTH AND BAHRS,
By GEORGE O. BAHRS,
Attorneys for Appellants.

(Appendix Follows.)

Appendix.

Appendix

Filed, October 24, 1956.
Clerk, U.S. District Court
Southern District of Calif.
By E. W. Eiland,
Deputy Clerk.

In the United States District Court
Southern District of California
Northern Division

No. 1517 ND

Conditioned Air and Refrigeration Co., a California corporation; Bell and Hughes, Inc., a California corporation; Baird Sheet Metal Works, a California corporation; Earl Griffith and John Dyer, a co-partnership doing business under the name of Griffith-Dyer,

Plaintiffs,

vs.

Plumbing and Pipe Fitting Labor-Management Relations Trust; Local Union No. 246 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada; Pipe Trades District Council No. 36 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada; Valley Group Negotiating Committee; and Paul L. Reeves,

Defendants.

MEMORANDUM AND ORDER

Plaintiffs seek an injunction against defendants to restrain and enjoin them from receiving or accept-

ing any money or thing of value from plaintiffs contrary to the provision of Section 302, Subsections (A) and (B) of the Labor Management Relations Act, 1947, as Amended. (29 USC Section 186)

Plaintiffs Conditioned Air and Refrigeration Co., Bell and Hughes, Inc., and Baird Sheet Metal Works are California corporations.

Plaintiffs Earl Griffith and John Dyer are co-partners, doing business as Griffith-Dyer.

All plaintiffs are engaged in businesses which come under the category of plumbing and pipe fitting. Their employees are members of the defendant Local Union No. 246 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada. The plaintiffs are all members of the Associated Plumbing Contractors of Central California, Inc., which is a member of the Northern California Conference of the Plumbing and Heating Industry.

The defendants are Plumbing and Pipe Fitting Labor-Management Relations Trust; Local Union No. 246 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada; Valley Group Negotiating Committee and Pipe Trades District Council No. 36 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and Paul L. Reeves who is chairman of District Council No. 36 and a trustee of the Labor-Management Relations Foundation hereinbefore mentioned.

That under date of July 20, 1952, the Valley Group Negotiating Committee, predecessor to Pipe Trades District Council No. 36, acting as the agent of the Local Union (among others) 246 of the United Association of the Plumbing and Pipe Fitting Industry of the United States and Canada, entered into a collective bargaining agreement with the Northern California Conference of the Plumbing and Heating Industry, Inc., acting on behalf (among others) of the Associated Plumbing Contractors of Central California, Inc. A copy of this agreement is attached as Exhibit "A" to the stipulation of facts filed herein on February 20, 1956. Under this contract the employers, including the plaintiffs, recognized the Union (the Negotiating Committee) as the sole and exclusive collective bargaining representative of all employees performing work covered by the agreement.

That in the summer of 1953 a collective bargaining agreement was entered into between the plaintiffs and the Valley Group Negotiating Committee acting as the agent (among others) of Local Union No. 246. A copy of this agreement is attached to the stipulation of facts marked Exhibit "B." In this agreement the plaintiffs recognized the Union (Negotiating Committee) as the sole and exclusive collective bargaining representative of its employees performing work under the agreement.

That about the month of April, 1954, the Negotiating Committee demanded that plaintiffs sign agreement amending Exhibit "B" attached to the stipulation. Plaintiffs refused to do so and in about the month of May, 1955, the Negotiating Committee caused

the employees of plaintiffs to strike, whereupon plaintiffs signed and executed such amendment, a true copy of which is attached to the stipulation of facts and marked Exhibit "C." The amendment to the contract did not change the recognition provisions of the prior contracts. Exhibit "C" among other things provided as follows:

> "Add Section 13(a) Pension Plan to Master Contract:
>
> (A) A pension trust to be known as The Valley Group Pipe Trades Pension Fund shall be created in accordance with the provisions of the Labor Management Relations Act, 1947, as Amended.
>
> (B) The Pension Trust shall be created prior to July 1, 1954.
>
> (C) Each Individual Employer shall, commencing July 1, 1954, pay into the Valley Group Pipe Trades Pension Fund ten ($0.10) cents per hour for each hour worked, by each employee employed on work covered by this agreement."
>
> * * * * * * *
>
> "Add Section 15(a) to Master Contract:
>
> (A) Where a labor-management set up exists by agreement between the Local Master Plumbers Association, regardless of its name or organization, and a Local Union affiliated with the Committee requiring that payment or payments be made, all Individual Employers covered by this agreement shall, if and when they perform work in the territorial jurisdiction of such local make the required payment or payments.
>
> (B) The nature, amount and time of such payment and the territorial jurisdiction of the Local Union shall be set forth in an appendix

to this agreement certified by the Local Union and Local Master Plumbers Association and shall be a part of this agreement.

Add Section 15(a) to Master Contract:

The Individual Employers covered by this agreement consent and agree to be bound by the terms of the effective Health and Welfare Trust Agreement, Pension Trust Agreement and agreement creating any Labor Management set up."

That on or about the 9th day of February, 1954, Associated Plumbing Contractors of Central California, Inc., and certain individual employers who were licensed contractors under the laws of the State of California and the defendant Local Union No. 246 entered into a trust indenture writing entitled "Plumbing and Pipe Fitting Labor-Management Relations Trust." A copy of this trust is attached to defendants' answer and marked Exhibit "B"; on the second day of August, 1955, said trust was amended and its name was changed to "Plumbing and Pipe Fitting Labor-Management Relations Foundation." A copy of said amendment is attached to defendants' answer marked Exhibit "C." This amendment increased the Board of Trustees to 12, 6 to be appointed by the Union and 6 to be appointed by the Associated Plumbing Contractors of Central California, Inc. The amendment also added a paragraph (Article VI-A) on the subject of arbitration.

That a collective bargaining agreement dated June 17, 1955, was entered into between the District Council No. 36 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (successor

to the Valley Group Negotiating Committee) acting as the agent (among others) of Local Union No. 246 and Valley Mechanical Contractors Council, Inc., acting as the agent (among others) of Associated Plumbing Contractors of Central California and other individual employers. A copy of this agreement is attached to defendants' answer marked Exhibit "A." Section 16 of said agreement provides:

"Section 16: Labor-Management Relations.

(A) Where a labor-management set up exists by agreement between the Local Employer, regardless of its name or organization, and a Local Union affiliated with the Union requiring that payment or payments be made, all Individual Employers covered by this agreement shall, if and when they perform work in the territorial jurisdiction of such Local, make the required payment or payments.

(B) The nature, amount and time of such payment and the territorial jurisdiction of the Local Union shall be set forth in an appendix to this agreement certified by the Local Union and the Local Employer and shall be a part of this agreement.

(C) The Individual Employers agree to be and are bound by all of the terms and conditions of the effective labor-management set ups and the agreement, trust agreement or charter and by-laws creating and governing any such set up.

(D) An Individual Employer who works with the tools of the trade shall be irrevocably presumed for all purposes to have worked no more nor less than 160 hours in any month in which an Individual Employer works with the tools of the trade."

Demand was made by District Council No. 36 upon the plaintiffs to execute a collective bargaining agreement in the form of said Exhibit "A." Plaintiffs have, and each of them has, refused to execute such agreement or to pay into the trust any of the sums specified in accordance with the terms of said agreement except the amounts specified in the fifth cause of action set forth in the complaint. District Council No. 36 is prepared to cause the employees of plaintiffs to strike to obtain the inclusion of Section 16 in said Exhibit "A" in a collective bargaining agreement with the plaintiffs.

The answers of defendants admit that Local Union No. 246 is a representative of employees, but deny that as to the employees here involved it is a "representative" of the employees who are in an industry affecting commerce within the meaning of Section 302 of the Labor Management Relations Act, 1947, as Amended, or at all. Defendants further admit that District Council No. 36 is as to the employees here involved a "representative" of employees within the meaning of said section and that its predecessor, Valley Group Negotiating Committee, was such a "representative" but deny that it or said Committee is or was as to the employees here involved "a representative of employees who are employed in an industry affecting commerce within the meaning of said Section."

Under the stipulation of facts filed herein it was stipulated:

> "1. That during the calendar year 1955 plaintiff employers made direct purchases of goods and materials from outside the State of California

in the amounts set opposite their names. Plaintiffs made purchases in California of goods and materials originating outside the State of California in the amounts set opposite their names; and plaintiffs furnished services and materials to firms engaged in commerce in the amounts set opposite their names, to wit:

	Direct Purchases	*Indirect Purchases*	*Services*
Baird Sheet Metal Works	$240,683.24	$ 29,389.00	$10,919.29
Bell and Hughes	127,472.19	68,109.92	46,372.66
Conditioned Air	213,351.25	199,589.16	45,681.06
Griffith-Dyer	161,464.15	47,032.06	49,018.24"

The cause came on for trial on the 8th day of August, 1956. The plaintiffs were represented by Roth and Bahrs, George O. Bahrs, appearing, and Paul K. Doty. The defendants were represented by P. H. McCarthy, Jr. Each party moved for a summary judgment based upon the pleadings and the stipulation of facts on file. It was stipulated that the motions and the trial on the merits would be submitted based upon the pleadings and the stipulation of facts. The cause was then argued by counsel for the respective parties. All matters were taken under submission by the court.

At the outset, the defendants contend that this court lacks jurisdiction of the cause for two reasons: first, that the dollar volume of interstate business transacted by each plaintiff is too small to adversely affect interstate commerce and that in this type of suit the volume of business of the individual plaintiffs may not be aggregated; second, that the complaint fails

to allege that the amount in controversy exceeds the sum or value of $3,000 as required by Section 1331, U.S.C. Title 28.

It is my conclusion that the volume of business transacted by each plaintiff as set forth in the stipulation is sufficient to establish that the employees of each plaintiff are employed in an industry affecting commerce within the meaning of Section 302 of the Labor Management Relations Act, 1947, as Amended. NLRB vs. Fainblatt, 306 U.S. 601. With respect to failure of the complaint to allege that the sum or value in controversy exceeds $3,000, I am satisfied that under the provisions of Section 302(e) of the Labor Management Relations Act, 1947, as Amended, such an allegation is not required. Said section reads as follows:

> "The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of sections 101-110 and 113-115 of this title."

The fact that the jurisdictional amount of $3,000 was expressly excluded from the provisions of Sections 301 and 303 of the Labor Management Relations Act, 1947, as Amended, is not persuasive that the failure to make such exclusion in Section 302 operates to include such jurisdictional requirement. Sections 301 and 302 relate to suits for damages by private persons. Sections 302(a) and (b) make it unlawful to do the

things proscribed by the provisions thereof. It is public rights which are being protected, and in my opinion the provisions of Section 302(e) grant jurisdiction to this court without regard to the sum or value in controversy if the volume of commerce of each plaintiff is not de minimis.

We will now pass to the basic issues which remain. Section 302(a) of the Labor Management Relations Act, 1947, as Amended, provides as follows:

> "It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce."

Section 302(b) of the same Act provides as follows:

> "It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value."

Section 302(c) of the same Act states that:

> "The provisions of this section shall not be applicable (1) * * *; (2) * * *; (3) * * *; (4) * * *; or (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from prin-

cipal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities."

Section 302(d) provides as follows:

> "Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both."

There is no dispute between the parties over the facts that the collective bargaining agreement (Exhibits "B" and "C" attached to the stipulation of facts) did and that the collective bargaining agreement (Exhibit "A" attached to the defendants' answer) does provide that each individual employer covered by the collective bargaining agreement, on work covered by said collective bargaining agreement, shall pay into the Plumbing and Pipe Fitting Labor-Management Relations Foundation (a trust) (Exhibits "B" and "C" attached to defendants' answer) ten ($0.10) cents per hour for each hour worked by each employee of each individual employer covered by the said collective bargaining agreements. It is also clear that the Valley Group Negotiating Committee was a labor organization and was recognized by the employers as the sole and exclusive bargaining representative of all employees of the individual employers performing work covered by the agreement and that District Council No. 36 (the successor of the Committee) a labor organization, was recognized as the sole and exclusive collective bargaining representative of the individual employer performing work covered by the collective bargaining agreement.

The Plumbing and Pipe Fitting Labor-Management Relations Foundation was created by, and its trustors are, Associated Plumbing Contractors, Inc. (a non-

profit membership corporation composed of individual employers, members and non-members of said Association) and Plumbers and Steam Fitters Local Union No. 246 (a labor organization, a local Union).

The collective bargaining agreement (Exhibits "B" and "C" attached to the stipulation) provide "where a labor-management set up exists by agreement between the local Master Plumbers Association, regardless of its name or organization, and a local Union affiliated with the Committee requiring that payment or payments be made, all individual employers covered by this agreement shall, if and when they perform work in the territorial jurisdiction of such Local make the required payment or payments," and that "the individual employers covered by this agreement consent and agree to be bound by the terms of the effective Health and Welfare Trust Agreement, pension trust agreement and agreement creating any labor-management set up." The collective bargaining agreement (Exhibit "A" attached to defendants' answer) contains similar provisions.

The Plumbing and Pipe Fitting Labor-Management Relations Foundation does not conform to the requirements of Section 302(c)(5) and the defendants do not contend that it does. The defendants maintain that the trust is not a "representative" within the meaning of the provisions of Section 302; that the trust is a separate entity and that Section 302 does not outlaw or forbid payments to and acceptance by those persons and entities who or which are not "representatives". Defendants further point out that six of the trustees of the trust are selected by the em-

ployers and that six are selected by Local Union No. 246, which fact prevents the Local Union from dominating and controlling the actions of the trustees.

As noted above, Section 302 makes it unlawful for any employer to pay or deliver or to agree to pay or deliver any money or other thing of value to any representative of any of his employees or for any representative of any employees to receive or accept or agree to receive or accept from the employer any money or other thing of value.

The Labor Management Relations Act of 1947, as Amended, states: "The terms 'commerce', 'labor disputes', 'employer', 'employee', 'labor organization', 'representative', 'person', and 'supervisor' shall have the same meaning as when used in subchapter II of this chapter as amended by this chapter." Section 142, subsection 3, U.S.C.A. Title 29.

Section 152, subsection 4, Title 29 U.S.C.A., states: "The term 'representative' includes any individual or labor organization." Subsection 5 of Section 152 states: "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

The Supreme Court of the United States had occasion to interpret the meaning of the word "representative" as used in Section 302. *U. S. v. Ryan,* 350

U.S. 299. The Court held that the term "representative" in Section 302 is not limited to the exclusive bargaining representative of the employees, but includes any person authorized by the employees to act for them in dealings with their employers. The Court also stated that a narrow reading of the term "representative" would substantially defeat the purposes of the Act.

It is conceded that the Valley Group Negotiating Committee was, and that District Council No. 36 is a representative of employees of the plaintiffs within the meaning of Section 302. It is further conceded that Local Union No. 246, one of the founders of the Trust, is a "labor organization". The question remains however, whether Local Union 246 is a "representative" within the meaning of Section 302. It is true that the Collective Bargaining Agreements state that the employers recognize the Valley Group Negotiating Committee under one contract, and the District Council No. 36 in the other contract, as the exclusive bargaining representative of the employees of the employers. The Court, however, is not bound by such declaration, but must determine from the documents in this case the true and legal status of Local No. 246. In executing the collective bargaining agreements, the Valley Group Negotiating Committee and District Council No. 36 expressly acted as agent of Local 246 and other local unions.

Pertinent parts of the collective bargaining agreement dated July 1, 1955 (Exhibit "A" attached to the answer of the defendants) read as follows:

"Section 1: Definitions

(A) The term 'Union' as used in this agreement means the DISTRICT COUNCIL NO. 36 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA SUCCESSOR TO THE VALLEY GROUP NEGOTIATING COMMITTEE acting as the agent of Local Unions Nos. 246, 365, 437, 492, 503, 607, and 662 of the UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA.

* * * *

(D) The term 'LOCAL UNION' as used in this Agreement means any of the Local Unions enumerated in subsection (A) hereof and any other Local Union which may hereafter authorize the UNION in a manner and form acceptable to said UNION to act as its agent and to bind it for the purpose of this agreement.

Section 2: WARRANTIES.

1. It is agreed that this agreement shall be binding upon the UNION and Local Unions set out in Section 1(A) hereof, and upon the EMPLOYER, Local Master Plumbers Associations set out and individual employers who are members of any Local Master Plumbers Association set out in Section 1(B) hereof, and upon the heirs, executors, administrators, successors, purchasers, and assigns of the Individual Employers covered by this agreement.

2. The UNION warrants that it is authorized to bind the Local Union set out in Section 1(A) hereof.

* * * *

Section 5: UNION MEMBERSHIP

(A) All Employees covered by this agreement shall be required as a condition of employment to apply for and become members of and to maintain membership in the Local Union, with jurisdiction within thirty-one days following the beginning of their employment under this agreement or the effective date of this sub-section (A) which is the later. This section shall be enforceable to the extent permitted by law.

* * * *

Section 6:

Subsection (B) Individual Employers must secure all Journeymen and Apprentices through the employment office of the Local Union with jurisdiction at the site of the work, and the UNION agrees that the Local Union will furnish competent Journeymen and Apprentices within forty-eight (48) hours when available.

1. The Individual Employer may call for a specific employee by name to be dispatched and the Local Union shall dispatch such employee provided that such employee is available, and

(a) is a preferred employee as defined in Section 6 (A) 1, and

(b) has not been employed outside of the Territorial jurisdiction of the Local Union within which the job site is located within 90 days of the employer calling for him by name except that this subsection (b) shall not apply

to an employee who has worked outside the territorial jurisdiction of the Local Union under paragraph (C) 2 of Section 6 within such 90 day period.

2. In the event that employees with a preference as herein defined are not available to fill vacancies, then the Local Union will undertake to supply the employers with competent and satisfactory employees. Neither as to such undertaking, nor as to any other portion of this agreement, shall any employee be discriminated against by reason of either membership in or non-membership in any Union.

3. The Local Unions will maintain appropriate registration facilities without discrimination either in favor of or against such applicants by reason of membership in or non-membership in any Union.

* * * *

(C) The provisions with respect to preference in employment by reason of prior employment are subject to the following limitation:

1. That whenever any test is required of any workman by any Individual Employer, the Local Unions upon being requested to furnish men for such test will dispatch only workmen who are experienced in the type of work for which the test is required, unless otherwise expressly agreed to by the Individual Employer.

Before any workman commences the test, he shall be placed on the payroll of the Individual Employer. Any workmen failing to pass the test shall be paid straight time for the test period but in no event less than four (4) hours at straight time.

2. On work contracted for by an Individual Employer outside the jurisdiction of the Local Union in which the Individual Employer's shop is located such Individual Employer may send one man to said job from the territorial jurisdiction of such Local Union; provided, however, that the Individual Employer shall notify the Local Union with territorial jurisdiction over the area in which the job site is located of the name of the Employee and the location of the job prior to the time the Employee is sent into the area and that the Employee before reporting to the job site, shall report to the Local Union having territorial jurisdiction over the area in which the job site is located in person, by telephone, by telegram, or in writing and the Local Union shall dispatch him. Adjacent Local Unions may enter into more liberal local understandings to cover jobs of short duration.

Section 7: COMPETENCY AND QUALIFICATIONS

The Individual Employer shall be the sole judge of the competency of his employees and may discharge any employee for cause. The Local Unions shall be the sole judge of the qualifications of their members for membership in the Local Union.

Section 8: CESSATION OF WORK

It is mutually agreed and understood that during the period when this agreement is in force and effect the Individual Employer will not lockout his employees and the Union will not authorize any strikes, slow-down or stop work, in any dispute, complaint or grievance arising under the terms and conditions of this agreement, except such disputes, complaints or grievances as arise

out of the failure or refusal of the Individual Employer to comply with the provisions of the Sections 5, 6, 13, 14, 15 and 16 hereof. As to any such Individual Employer who shall fail or refuse to comply with the provisions of these Sections or any of them, so long as such failure or refusal continues, it shall not be a violation of this agreement if the UNION or Local Union withdraws its members who are subject hereto from the performance of work for such Individual Employer and such withdrawal for such period shall not be a strike or work stoppage within the terms of this agreement. Any employees so withdrawn or refusing to perform any work as herein provided shall not lose their status as employees but no such employee shall be entitled to claim or receive any wages or other compensation for any period during which he has been so withdrawn or refused to perform work.

* * * *

Section 10: JURISDICTIONAL DISPUTES

In the event of any dispute between Local Unions of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada as to the jurisdiction of the work performed by Individual Employers, such dispute shall be referred to, and settled by the United Association. In the event of any dispute as to jurisdiction of the work covered by the terms of this agreement by reason of any such work being claimed by a union or unions other than the United Association, such dispute shall be referred and settled in accordance with any procedure or agreement

for the settlement of jurisdictional disputes to which the United Association is a party or by which it is bound.

It is agreed that this agreement shall constitute an original assignment of work to the employees covered hereby on work performed by the Individual Employers covered hereby. In either event, the parties hereto agree that there will be no slow-down or stoppage of the work and each agrees that the decisions of the authorities stipulated herein shall be final and binding upon them.

* * * *

Section 16: LABOR-MANAGEMENT RELATIONS

(A) Where a labor-management set up exists by agreement between the Local Employer, regardless of its name or organization, and a Local Union affiliated with the Union requiring that payment or payments be made, all Individual Employers covered by this agreement shall, if and when they perform work in the territorial jurisdiction of such Local make the required payment or payments.

(B) The nature, amount and time of such payment and the territorial jurisdiction of the Local Union shall be set forth in an appendix to this agreement certified by the Local Union and the Local Employer and shall be a part of this agreement.

(C) The Individual Employers agree to be and are bound by all of the terms and conditions of the effective labor-management set ups and the agreement, trust agreement or charter and by-laws creating and governing any such set up.

(D) An Individual Employer who works with the tools of the trade shall be irrevocably presumed for all purposes to have worked no more nor less than 160 hours in any month in which an Individual Employer works with the tools of the trade.

Section 17: JOINT CONFERENCE BOARD

(A) In those areas in which labor-management set up exists, such labor-management set up shall function as a Joint Conference Board with all the powers, rights, duties and obligations hereinafter lodged in the Joint Conference Board.

(B) It is the intention of the parties to this agreement to settle problems that may arise on a local level; however, in order to bring about general recognition and enforcement of this agreement, the parties hereto shall proceed to set up a Joint Conference Board, of four (4) members. Two (2) members shall be selected by the Local Union and two (2) by the Local Employer.

(C) Contemporaneously with the execution of this agreement the Local Employer shall notify the Local Union and the Local Union shall notify the Local Employer in writing of their respective Board members.

(D) The Joint Conference Board shall agree upon and determine the time and place of meeting, the rules of procedure, shall elect a chairman and a secretary from its membership, and shall determine upon all other details necessary to promote and carry on the business for which it is appointed.

The function of the Joint Conference Board shall be:

1. To establish the general recognition and enforcement of the wages, hours, and working conditions of the agreement.

2. To hear and adjust disputes or differences wich may arise in the enforcement or interpretation of this agreement except those under Sections 5, 6, 13, 14, 15 and 16.

3. To promote the mutual interest of the parties to this agreement.

4. Pending the decision upon any dispute or grievance, work shall be continued in accordance with the provision of this agreement.

(E) If the Joint Conference Board, after meeting, cannot agree on any matter referred to it, the members thereof shall choose an impartial person who shall act as an additional member of the Joint Conference Board and participate in the making of a decision by the majority of the members. Said decision shall be rendered within ten days after submission and shall be final and binding on all parties hereto. Any expense of employing such impartial person to sit shall be borne equally by the Local Employer and Local Union.

(F) The Joint Conference Board shall meet at the time and place set by the Local Employer if an Individual Employer is the complaining party or at the time and place set by the Local Union if a Local Union or employee is the complaining party. The place of the meeting shall be in the jurisdiction of the Local Union in which the dispute arose. The time shall be not less than five (5) days or more than ten (10) days from the date the dispute, complaint or griev-

ance is called to the attention of the other party. Notice of time and place shall be given at the time the dispute, complaint or grievance is called to the attention of the other party."

Similar provisions are contained in the collective bargaining agreements negotiated by the Valley Group Negotiating Committee (Exhibits "A", "B" and "C", attached to stipulation of facts).

I am satisfied from an analysis of the quoted provision of the collective bargaining agreements that Local Union No. 246 is in fact and in law a party to such agreements, and therefore a "representative" of the employees of the plaintiffs within the meaning of Section 302.

Is the Plumbing and Pipe-fitting Labor-Management Relations Foundation a "representative" of the employees of plaintiffs? The Trust recites that "Whereas there is presently no effective machinery whereby the provisions of applicable collective bargaining agreements can be policed and enforced and whereby the general public can be protected from imperfect, improper and unsanitary installation, poor or shoddy materials or poor and improper work and workmanship, and

Whereas, the absence of such effective machinery is producing chaos in the Plumbing and Pipe-fitting industry and in endangering the wages, rates of pay, hours of labor and other conditions of employment of the employees and destroying the trust and confidence of the public in the employers and in the plumbing and pipe-fitting industry,

Now, therefore, to correct this situation, to protect the wages, rates of pay, hours of labor, and other conditions of employment of the employees, to restore the trust and confidence of the public in the employers and the plumbing and pipe-fitting industry, this Trust is created."

The stated purposes of the Trust are to perform and perfect "an organization for the purpose of improving the relationship between the employers and employees making up the plumbing and pipe-fitting industry and the general public, and to enforce the collective bargaining agreement and the provisions thereof covering work within the jurisdiction of the United Association of Journeymen and Apprentices of the Plumbing and Pipe-fitting Industry of the United States and Canada, to protect the wages, rates of pay, hours of labor, and other conditions of employment of the employees in the plumbing and pipe-fitting industry and to protect the general public from imperfect, improper and unsanitary installations, poor or shoddy materials and poor or improper work and workmanship."

The only specific purposes of the Trust are to enforce the collective bargaining agreement and the provisions thereof, covering work within the jurisdiction of the United Association of Journeymen and Apprentices of the Plumbing and Pipe-fitting Industry of the United States and Canada, and to protect the wages, rates of pay, hours of labor and other conditions of employment of the employees in the plumbing and pipe-fitting industry. The other stated purposes are vague and uncertain.

The Trust agreement states that the Board of Trustees is authorized to, and shall have the power to pay out of the assets of the Trust, at the sole and exclusive discretion of the trustees, for, among other things, "to protect the wages, rates of pay, hours of employment, and other conditions of employment of the employees in the plumbing and pipe-fitting industry, * * * to enforce the collective bargaining agreements and the provisions thereof, covering work within the jurisdiction of the United Association of Journeymen and Apprentices of the Plumbing and Pipe-fitting Industry of the United States and Canada." The Board of Trustees is authorized "to employ such executive, administrative, accounting, clerical, secretarial and legal personnel and other employees and assistants, as may be necessary in connection with the carrying out of the Trust and to pay or cause to be paid, out of the Trust the compensation and expenses of such personnel and assistants, the cost of office space, furnishings and supplies and other expenses of the Trust."

It must be presumed that the Trust will carry out the specifically stated provisions for which it was formed, and which are above quoted. The Trust comes within the term "labor organization" as defined in Subsection 5 of Section 152, Title 29 U.S.C.A., and is a "representative" of the employees under Section 4 of Section 152. It is my view that the Trust is a "representative" of the employees of the plaintiffs. It is clear under the decision of *United States v. Ryan*, (supra) that a "representative" is not limited to the exclusive bargaining agent of the employees. The fact

that the Trust agreement contains an arbitration clause cannot operate to validate acts prohibited by Section 302.

It is clear to me that if the plaintiffs were required to make the payments in question to Local Union 246, such payments and receipt would be forbidden by Section 302. The fact that the payments are to be made to the Trust does not, in my opinion, alter the situation, since the Trust under the documents under review, is likewise a "representative" of the employees of the plaintiffs. Furthermore, it is my view that the prohibition in Section 302 forbidding the payment of money or other thing of value to a representative, or the receipt thereof by a representative, is not limited to cash or tangible property. The expression, "other thing of value" would include the benefits flowing from the use or application of the money paid. Under the Trust in question, the payments required to be made by the plaintiffs are to be devoted to enforcement of the collective bargaining agreements, to protect wages, hours of labor, conditions of employment, and to hire personnel, furnish office space, etcetera, to carry out such purposes. It is my view that this constitutes payment of a thing of value to Local 246. The fact that the control of the Trust is equally divided between the employers and the representatives of the employees does not change the situation in view of the provisions of the Trust agreement.

The defendants have cited the cases of *United Marine Division v. Essex Transportation Company,* 216 Fed.2d 410; *Rice-Stix Dry Goods Company v. St. Louis Labor Health Institute,* D.C.E, No. 22 LRRM

2528; *People v. Cilento,* 143 N.Y.S. 2d 705; and *Bay Area Painters and Decorators Joint Committee, Inc. v. Orack,* 102 C.A. 2d 81. In the *Essex* case, payments by the employer were to be made to six trustees of a welfare fund. From aught that appears in the opinion of the Court the Trust providing for the welfare fund was in strict compliance with the requirement of Section 302(c)(5). Admittedly, the Trust here involved does not so comply. In the *Rice-Stix* case, the Court concluded that the Health Institute was a corporation independent of the labor union which was a representative of the bargaining unit of the employees of the plaintiff. The fund created was to be used for health purposes. In neither of the cases was there a trust agreement containing provisions such as the quoted provisions of the Trust here in question. The *Cilento* case involved a construction of the Penal Statute of the State of New York, and in my opinion, the correct decision was reached under the facts and the applicable law.

In the *Orack* case, the Court determined that the agreement in question did not constitute a monopoly or a restraint of trade under the law of the State of California. It did not involve Section 302 of Title 29 U.S.C.A.

My attention has been called to a memorandum order made by the Honorable Edward P. Murphy, United States District Judge, Northern District of California, in the case of *Sheet Metal Contractors Association of San Francisco v. Sheet Metal Workers International Association,* No. 35206. In his memorandum order Judge Murphy stated that the purposes for

which the Board [Joint Industry Board] was established are not entirely clear. I have had the opportunity of examining the Trust Agreement establishing the Joint Industry Board. I find nothing in the agreement to indicate that it was any purpose of the Joint Industry Board to enforce the collective bargaining agreement between the Union and the employees of the plaintiff or to protect the wages, rates of pay, hours of labor or other conditions of employment of such employees, or to expend its funds for such purposes.

I am aware that labor-management plans are to be encouraged. I recognize that great strides have been made in such fields to the benefit of labor, management and the public. As a Judge, however, as stated by counsel for the defendant, my duty is to determine whether the cloth is cut to fit the pattern laid down by the Legislature. It is not for the Court to push or pull the pattern to fit the cloth already cut or to trim the cloth already cut to fit the pattern.

Accordingly, the motions for summary judgment are denied and judgment is ordered for the plaintiffs.

Counsel for the plaintiffs are directed to prepare and file findings of fact, conclusions of law, and form of judgment, in accordance with the rules of this Court.

The Clerk of this Court is directed to forthwith mail copies of this order to respective counsel.

Gilbert H. Jertberg

Dated: October 23, 1956

No. 15,355

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SHEET METAL CONTRACTORS ASSOCIATION OF SAN FRANCISCO, *et al.*,

Appellants,

vs.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, *et al.*,

Appellees.

APPELLEES' PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF.

GILBERT, NISSEN & IRVIN,
117 West Ninth Street,
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Attorneys for Appellees.

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No. 15,355

IN THE

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Appellants,

vs.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, *et al.*,

Appellees.

APPELLEES' PETITION FOR REHEARING.

To the Honorable William Denman, Walter L. Pope, and Stanley N. Barnes, Circuit Judges of the United States Court of Appeals for the Ninth Circuit:

COME NOW appellees and within proper time pursuant to Rule 23 of the above-entitled court, file this, their petition for rehearing, respectfully calling attention of the court to the following material matters of law and fact inadvertently overlooked or misconstrued by the court as shown by the face of its opinion:

I.

This Court, in reversing the judgment against the appellant San Francisco Sheet Metal Contractors Association inadvertently disregarded the undisputed fact that

said appellant association is not an "employer" within the meaning of Section 302 of the Labor Management Relations Act, 1947, and has not itself paid nor been compelled to agree to pay any "money or other thing of value" to the Joint Industry Board Fund or to any defendant, so that, even under the rule of law set forth in the Court's opinion, appellees were clearly entitled to a summary judgment of dismissal against this particular appellant.

II.

This Court, in reversing the judgment against the 20 appellant employees (other than the eight appellant employers who undertook to perform jobs or contracts in the northern counties and made payments to the fund in question), inadvertently disregarded the undisputed fact that said 20 appellant firms and corporations have not paid nor been compelled to agree to pay anything to the Joint Industry Board Fund or to any defendants, so that, even under the rule of law set forth in the Court's opinion, appellees were clearly entitled to a summary judgment of dismissal against these particular appellants.

III.

This Court, in reversing the judgment in favor of the appellees Sheet Metal Workers International Association and its Local Union No. 104, inadvertently disregarded the undisputed fact as disclosed by the record herein that these appellee labor organizations have neither received, accepted, nor undertaken to solicit or compel any payments to the Joint Industry Board, so that they were entitled to recover a judgment of dismissal on that ground alone, even under the rule of law set forth in the Court's opinion.

IV.

This Court relied in its opinion upon the fact that payments to the Joint Industry Board did not fall within any of the exceptions stated in subdivision (c) of Section 302 and, in part, rejected the *Essex Transportation Co.* case, 216 F. 2d 410, as persuasive authority on the mistaken ground that there the Third Circuit was dealing with a "welfare fund" which "may well have come within the exception" set forth in subdivision (c)(5) of Section 302, thereby inadvertently overlooking the legislative history of the statutory provision which discloses that Congress did not intend to prohibit payments to all jointly-controlled trust funds not set up for a purpose specified in Section 302(c), and likewise overlooking the fact that the *Essex* case involved an oral agreement to make payments to a pension trust fund so that the welfare trust fund exception of Section 302(c)(5) could not have been applicable.

V.

This Court inadvertently misconstrued the language of 29 U. S. C., Sec. 152(5) which refers to *"dealing with employers concerning grievances, etc."* by overlooking various available aids to the proper interpretation of that language which establish that it is synonymous with "collective bargaining" which is conducted by individuals who represent organizations authorized by the employees to act for them in dealings with their employers, so that this Court's interpretation is in conflict with the *Ryan* decision, 350 U. S. 299.

VI.

This Court inadvertently misconstrued the language of 29 U. S. C., Sec. 152(5) which refers to *"any organiza-*

tion of any kind . . . in which employees participate" by concluding that such language contemplated "participation by representation," thus overlooking various available aids to its proper interpretation which establish that it does not apply to organizations formed by good faith collective bargaining and operated jointly by an employer association and a bona fide labor union, which union is not itself employer-dominated or employer-controlled contrary to 29 U. S. C., Sec. 158(a)(2).

VII.

This Court inadvertently overlooked material provisions of the Joint Industry Board Trust Agreement which, as found by the Trial Court, expressly provide for the separate character of the Joint Industry Board from either the Employer Association or the Union and expressly preserve their duties and relationships with respect to each other and each of them with respect to their members, thereby mistakenly concluding that the Joint Industry Board is "a mere adjunct of the union" and not an "independent unit or entity."

VIII.

This Court inadvertently overlooked material provisions of the Joint Industry Board Trust Agreement which, as the Trial Court found, provide that all decisions of the Joint Industry Board must be made with the concurrence of a majority of the employer members as well as a majority of the union members and make the power to expend any and all funds contributed by the employers or to render any other decisions dependent upon the approval of the employer members and further provide that if the employer members refuse to sanction

any expenditure or concur in any decision, for any reason, such disagreement shall be settled through arbitration by an "impartial person who shall act as an arbitrator," designated in the absence of joint selection by the president of the University of San Francisco, so that this Court mistakenly concluded that decisions making concessions to the employers could only be made by union action.

IX.

This Court inadvertently disregarded the express finding of the Trial Court that all members of the Joint Industry Board hold the funds in question in trust for the purposes enumerated in the Trust Agreement, which finding was supported by substantial evidence including the stipulated fact that the union-appointed members of the Board "were and are acting as such trustees," thereby mistakenly concluding contrary to the true facts and without any supporting evidence or findings in the record that said union-appointed members "were compelled to take orders from the union" in violation of their fiduciary duties as trustee.

Appellees respectfully pray the Court to grant a rehearing herein, based upon the foregoing grounds.

Dated: Los Angeles, California, October 14, 1957.

Respectfully submitted,

GILBERT, NISSEN & IRVIN,

By ROBERT W. GILBERT,

Attorneys for Appellees.

Certificate of Counsel.

The undersigned, Robert W. Gilbert, counsel of record for appellees, hereby certifies that the above and foregoing petition for rehearing in his judgment is well founded and that it is filed in good faith and not interposed for delay.

ROBERT W. GILBERT.

No. 15,355

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SHEET METAL CONTRACTORS ASSOCIATION OF SAN FRANCISCO, *et al.*,

Appellants,

vs.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, *et al.*,

Appellees.

BRIEF IN SUPPORT OF APPELLEES' PETITION FOR REHEARING.

I.

The Appellant Contractors Association Is Not an Employer Within the Meaning of Section 302 Which Paid or Agreed to Pay Anything to the Joint Industry Board Fund, or Was Asked to Do So.

Although the appellees endeavored to point out to this Honorable Court of Appeals that the appellant Sheet Metal Contractors Association of San Francisco "is not itself an 'employer' within the meaning of Section 302 and has not itself paid nor been compelled to agree to pay any 'money or other thing of value' to the Joint Industry Board Fund or to any defendant" (Appellees' Br. pp. 33-34), the Court's opinion herein reverses the

judgment as to all the plaintiffs and appellants, including said Association, and makes a blanket declaration that—

> ". . . the allegations of the complaint, plus the stipulations of the parties, set forth facts sufficient to entitle *the plaintiffs* to an injunction against *further demand.*" (Opinion, p. 15. Emphasis added.)

Subdivision (c) of Section 302 confers jurisdiction upon the district courts to restrain violations of that section (Opinion, p. 2, fn. 2 and accompanying text), *i.e.* to issue injunctions against payment or delivery of any money or thing of value to an employee representative by an employer; receipt or acceptance of any money or other thing of value from an employer by such representative; or agreeing to do so. (Opinion, p. 1, fn. 1 and accompanying text).

As to the appellant Contractors Association, the "Answer" herein expressly denied that it is an "employer of employees engaged in an industry affecting commerce within the meaning of Section 302" [R. 12] and that appellees are attempting to cause and compel it to pay and deliver money and other things of value to the Joint Industry Board [R. 13]. Neither the "Complaint" [R. 3-11] nor the "Stipulation of Facts" [R. 16-21] allege or set forth any facts which would support a finding adverse to the appellees on these two issues raised by the pleadings.

Accordingly, we respectfully submit that this Honorable Court's opinion should be modified by affirming the judgment below with respect to the appellant Contractors Association.

II.

Twenty of the Appellant Employers Did Not Pay or Agree to Pay Anything to the Joint Industry Board Fund, nor Were They Asked to Do So.

Appellees similarly endeavored to emphasize before this Honorable Court of Appeals that eight named San Francisco sheet metal contractors (Apex Sheet Metal Works; Atlas Heating and Ventilating Co., Ltd.; Gilmore Air Conditioning Service; Scott Co.; Western Plumbing & Heating Co., Inc.; Ace Sheet Metal Works; Valley Sheet Metal Co. and Otis Sheet Metal, Inc.) employing members of Local 104 in the Northern California counties were the only appellant employers making the questioned payments into the Joint Industry Board Fund or who in any manner have been asked to do so or to agree to do so. (Appellee's Br. pp. 32-33; *Cf.* Opinion, pp. 2, 4, and 5.)

Nowhere does the "Complaint" allege nor the "Stipulation of Facts" disclose that any of the 20 remaining appellant employers who are members of the San Francisco Contractors Association have *ever* carried on jobs in the Northern California counties or moved their work forces into the area of Local Union 75, or even expressed a desire to do so.

As this Court correctly stated in its opinion (p. 5), appellants claimed that the payments to the Joint Industry Board Fund by the eight above-mentioned employers which had been induced by strike threats of Local 75 were made unlawful under Section 302(a) and that the acceptance of such payments by the Joint Industry Board was in violation of Section 302(b) and based on those claims asserted that "they (sic) are entitled to an injunc-

tion to restrain such violations of §302 under the provisions of subdivision (e)".

Even under the interpretation of Section 302 set forth in the Court's opinion, appellees were clearly entitled to a summary judgment of dismissal against the 20 appellant employers who did not pay or agree to pay anything to the Joint Industry Board Fund, and were not even asked so to do, so far as the record herein discloses. For that reason, we respectfully urge that this Honorable Court's opinion should be modified to affirm the judgment below with respect to these particular appellants.

III.

The Appellee International Union and Its Local 104 Did Not Receive, Accept, nor Undertake to Solicit or Compel Any Payments to the Joint Industry Board Fund.

As reflected in their brief (pp. 34-35), the Sheet Metal Workers International Association and its Local Union 104, defendants and appellees herein, have neither received, accepted nor sought to solicit or compel the questioned payments herein. The "Stipulation of Facts" [R. 20-21] conclusively shows that no payments were made or agreed to be made by any of the plaintiff employers except to the Joint Industry Board Fund and that no efforts to secure the making of such payments were undertaken by any of the defendants except Local 75. (*Cf.* Opinion, p. 5, par. 1.)

Since there is absolutely no evidence in the instant record which would support a finding that the Sheet Metal Workers International Association and Local 104 have engaged in or threatened to engage in any violations of Section 302, the district court lacked jurisdiction

to grant injunctive relief against them (see Appellees' Br. pp. 66-67). Therefore, the Court's opinion should be modified by affirming the judgment below with respect to these particular appellees.

IV.

Congress Did Not Intend to Prohibit Payments to All Jointly-Controlled Labor-Management Trust Funds Not Coming Within the Exceptions Stated in Subdivision (c) of Section 302.

By implication at least, the Court's opinion herein adopts the conclusion that the only labor-management trust fund payments permitted by Section 302 are those falling within the "exceptions" stated in subdivision (c), the most important being funds to provide employee health and welfare and pension benefits. (Opinion, p. 9, fn. 6 and accompanying text.)

Thus, the decision in *United Marine Division v. Essex Transportation Co.,* 216 F. 2d 410 (C. A. 3rd), relied upon by the trial court herein, was rejected as persuasive authority by this Honorable Court in part because of its stated conclusion that "the quoted language *may well be mere dictum* for it indicates that the court was dealing with a welfare fund which *may well have satisfied the exception* to the general language of §302 which is set forth in subdivision 5. . . ." (Opinion, p. 13. Emphasis added.)

As pointed out in Appellees' Brief (pp. 37-38), the *Essex* case could not have been decided on the basis of a finding of compliance with the welfare trust fund requirements of Section 302(c)(5), since it arose out of a suit brought by a plaintiff union to compel payments to trustees of a pension trust based upon an *oral agreement*

by the defendant employer. (See *Annotation; Labor Management Relations Act*—Sec. 302, 100 L. Ed. 343, 345.) One of the "elaborate qualifying provisos" referred to in footnote 6 of the Court's opinion herein as "strictly limiting the use of such funds and the manner in which they may be set up" is that listed in Section 302(c)(5)(B), which requires that—

> "the detailed basis on which such payments are to be made is specified in a *written agreement with the employer* . . ." (29 U. S. C., Sec. 186(c)(5)(B). Emphasis added.)

Just following the language quoted at page 13 of this Honorable Court's opinion, Circuit Judge Goodrich stated for the unanimous Third Circuit Court that—

> "We think that the [oral] promise in this case is outside the evil which Congress was endeavoring to erase in the sections of the statute which we have quoted. Since the fact situation is outside that evil, we do not think we should enlarge an application of the statute to void this type of arrangement which has met with legislative sanction, judicial approval, and is a growing trend in employer-employee relations."

While it is conceded that the Supreme Court of the United States rejected a "narrow construction" of Section 302 that "would frustrate the primary intent of Congress" (*United States v. Ryan,* 350 U. S. 299, 304, quoted by the Opinion herein at p. 14), the Fourth Circuit concluded after the *Ryan* decision, as had the Third Circuit previous thereto, that Section 302—

> "is not to be stretched to cases not covered, merely because it may seem to a court that Congress would have done well to cover them. Even when the

> court may feel that if the omission had been called to the attention of Congress, it might have written the statute differently to cover the omitted case, the Court is not empowered to exercise the task of revision." (*Ventimiglia v. United States*, 242 F. 2d 620 (C. A. 4th), decided March 11, 1957.)

Nothing in the unanimous opinion of Mr. Justice Clark in the *Ryan* case supports the contention of the appellants in this case, indirectly approved by this Honorable Court's opinion, that Congress intended to forbid all payments of any kind to all types of joint labor-management trust funds "however laudable their purpose might be" and "however carefully administered and audited", simply because "the fund is to be used for purposes jointly agreed upon by the union and the employers which are not purposes specified and permitted by Section 302" in subdivision (c) of that section. (*Cf.* Appellants' Op. Br. pp. 7, 27.)

Although this Court concluded that "a mere reading of §302 demonstrates the fallacy of any such position" (Opinion, p. 13), the United States Department of Justice officially expressed to the Congress "some doubt that the section prohibits payments to a board of trustees composed of representatives both of employer and employees, even if not set up for a purpose permitted by the section" (Appellees' Br. pp. 24-25). Moreover, the Congress itself has recognized the necessity for amending the statute so that it will contain "clear and unmistakeable language to the effect that no money may be paid to any trust which is the subject of collective bargaining except in accordance with the limitations enumerated in section 302(c)(5)." (See Appellees' Br. p. 22; also pp. 25-27.)

Despite the absence of such legislative amendment by the Congress to date, the ruling in this case, if permitted to stand without modification, substantially impairs the validity of numerous trust funds created through collective bargaining for administration of joint labor-management programs for *apprenticeship training; disputes settlement and voluntary arbitration; industrial safety,* etc., etc., although other courts have consistently recognized that joint labor-management cooperation is a "social device to be encouraged". (See cases cited at Appellees' Br. pp. 28-29 and *Bay Area Painters Joint Committee v. Orack,* 102 Cal. App. 2d 81, 85-86, 226 P. 2d 644, quoted therein at p. 47.) The Congress of the United States has specifically adopted legislation for the purpose of fostering the creation of joint labor-management machinery for *apprenticeship training, disputes settlement and voluntary arbitration, industrial safety,* and the like. (See Appellees' Br. pp. 53-55 and 57-59.) Our production experience during World War II disclosed that some 5,000 labor-management committees organized in factories, mines and shipyards throughout the United States under the auspices of the War Production Board, an agency of the Federal Government, made a substantial contribution to the national defense through the promotion of industrial peace and labor-management cooperation. (de Schweinitz, *Labor and Management in a Common Enterprise* (Harvard University Press), pp. 4-6.) As a result, the growing trend in employer-employee relations toward the development of joint labor-management cooperation through bi-partite boards or committees has been encouraged by legislative bodies and by other courts as a matter of public policy.

Appellants themselves made reference to the 1957 proposal of Secretary of Labor Mitchell to amend Section 302 of the Taft-Hartley Act so that employers may continue to pay money into trust funds for the support of *jointly-administered apprenticeship and training programs in the building and construction industry,* but subject to the *new condition* that "the requirements of clause (B) of the proviso to Clause (5) of this subsection [29 U. S. C. §186 (c)(5)(B)] shall apply to such trust funds." (*S. 1614, 85th Cong., 1st Sess.,* referred to at Appellants' Reply Br. pp. 19-20.)

The "primary intent of Congress" referred to in the *Ryan* decision was to place "explicit limitations on welfare funds" because "Congress was disturbed by the demands of certain unions that the employers contribute to *'welfare funds' which were in the sole control of the union or its officers and could be used as the individual officers saw fit".* (350 U. S. at p. 304. Emphasis added. This language is quoted in this Court's opinion at p. 14, and discussed in footnote 4 thereof at p. 7.) In addition to these limitations on "welfare funds" set forth in Section 302(c)(5), Congress adopted a "broad prohibition" in Section 302(a) and (b) to deal with *"a case where the union representative is shaking down the employer."* (350 U. S. at pp. 304-306, quoted in this Court's opinion at p. 7.)

Consideration of the actual legislative history of this "highly specialized restriction on the legality of employers' agreements to make payments to employee representatives" (*Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.,* 348 U. S. 437, fn. 2 of opinion) demonstrates that the evil which Congress sought to reach was to prevent "kickbacks", "bribes"

or other forms of "labor racketeering", as well as to prevent arbitrary dispensation by union officers of funds obtained through employer contributions made pursuant to collective bargaining agreements. (See Appellees' Br. pp. 27-32.)

Since there was no evidence or contention in this case that any of the employers were "tampering with the loyalty of union officials" or that "disloyal union officials" were "levying tribute upon employers" (Learned Hand, J., dissenting in the *Ryan* case, 225 F. 2d at p. 426, quoted in this Court's opinion at p. 7), or that the union-appointed members of the Joint Industry Board were engaging in any such "practices which are wrong and harmful to labor-management relations and inimical to public welfare" or "which are potentially wrong in that field (*United States v. Connelly*, 129 Fed. Supp. 786), the result reached by the Court herein implies that all jointly-controlled labor-management trust funds not falling within the exception provided by Section 302(c)(5) are deemed illegal *per se*, without regard to the purpose of the legislation. If such conclusion was not intended, then we respectfully urge that the opinion should be clarified accordingly.

V.

Aiding in the Settlement of Labor-Management Disputes and Providing Joint Arbitration Machinery Does Not Constitute "Dealing With Employers" as a Labor Organization.

In reaching its conclusion that "the Joint Industry Board satisfies that part of the [statutory] definition of 'labor organization' which recites that it is one which exists for the purpose in whole or in part of dealing with employers concerning grievance, labor disputes, wages, etc."

(Opinion, p. 11), this Honorable Court relies upon a portion of Paragraph 17 of the addenda to the Local 75 agreement providing that "Any disputes arising out of this agreement shall be referred to the Joint Industry Board." [R. 27, quoted at Opinion, p. 10.]

Apparently, the Court overlooked the express proviso to that arrangement which declares that "The Joint Industry Board shall not alter or amend the Bargaining Agreement without a majority vote of both the Union and the Association membership." [R. 28.] Thus, the Joint Industry Board was precluded from "negotiating a new contract or a contract containing the proposed modifications" which function comes within the statutory obligation of the employer and the representative of the employees to *bargain collectively* with each other, and to execute a written contract incorporating any agreement reached if requested by either party. (29 U. S. C., Sec. 158(d).)

This Court also relied upon the second stated purpose as expressed in the Joint Industry Board Trust Agreement [R. 30, quoted at Opinion, p. 10; see also p. 8, footnote 5] which confers upon the Joint Industry Board the following function:

> "To aid in the settlement of any and all disputes of any nature whatsoever which may arise between the Union, its members, agents and/or representatives, and the above-named association, its members and all other employers of union members who are signatories to agreements with the union."

Here again, the Court apparently overlooked the express provisions of the Trust Agreement which limits the power of the Board to "conduct its affairs" by adopting "rules and regulations" which must be "consistent with all the terms and conditions of . . . the Bargaining Agree-

ment" and "not inconsistent with the Constitution and By-Laws of the Local Union and its International, the Sheet Metal Workers' International Association, or the Constitution and By-Laws of the [Employer] Association signatory hereto." [Paragraph 4 of the Trust Agreement, R. 39.]

The addenda to the Local 75 Union Agreement clearly states that any disputes arising therefrom which are "referred to the Joint Industry Board" shall be handled according to the "provisions for the settling of all disputes as set forth in the 'Trust Agreement' of the Joint Industry Board" [Paragraph 17, R. 27.] Let us re-examine the Trust Agreement to determine exactly what those provisions are.

The Joint Board is expressly empowered to "set up and administer a joint arbitration committee and to provide further arbitration procedures should the Joint Arbitration Committee be unable to decide or resolve a dispute." [Paragraph A-3, R. 30, quoted at Opinion, p. 8, footnote 5.] More specifically, "In the event that the Board is unable to reach agreement, the members thereof shall choose an impartial person who shall act as arbitrator", or if unable to do so within 10 days, "shall request the President of the University of San Francisco to designate an arbitrator" whose decision "shall be final and binding on all parties." [Paragraph O, R. 40.] The opinion of this Honorable Court herein makes absolutely no reference to this arbitration procedure, which roughly corresponds to that set forth in Section 302(c)(5) for breaking deadlocks within a board of trustees over the administration of a welfare fund.

(Thus, Section 302(c)(5) requires that "employees" and "employers" shall be "equally represented" and "in

the event the employer and employee groups deadlock" the trust agreement must provide that "the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office.")

The term *"dealing with employers"* as used in Sec. 152(5) of Title 29 U. S. C. obviously refers to something other than the functions of *conciliation, mediation,* and *voluntary arbitration* performed by the Joint Industry Board. (See Appellees' Br. pp. 55-59.) In the *Ryan* case, *supra,* the Supreme Court partially adopted the dissenting views of Judge Learned Hand in the Second Circuit (255 F. 2d 417) to hold that in using the term "representative" in Section 302 Congress meant to include "any individual or labor organization" that has been *"authorized by the employees to act for them in dealings with their employers."* (350 U. S. at pp. 302 and 306) without restricting the term to the "exclusive bargaining representative."

On the other hand, the *Ryan* decision made it plain that Section 302 only prohibits payments to labor unions and their officials that *"represent employees in their relations with the employers."* (See Appellees' Br. pp. 19-20.) Stressing the fact that "collective bargaining" is "conducted by individuals who represent labor", the Supreme Court held that "payments to Ryan individually" were prohibited by Section 302, because the ILA President's "relationship" brought him within the term "representative", that is, he "represented employees both as a union president and principal negotiator."

Speaking for the unanimous Supreme Court in *Ryan,* Mr. Justice Clark noted that "as president of the representative union, he [Ryan] was a member of its wage scale committee and signed all negotiated agreements" and declared, "We do not decide whether any official of a union is ex officio a representative of employees under Section 302" (350 U. S. at p. 301).

The legislative history of the original Wagner Act definitions of the related terms "representative" and "labor organization" which have been carried forward without change in the Taft-Hartley Act (See Opinion, p. 10) makes it clear that the phrase "dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work" is synonymous with the term *"bargain collectively"* which first appeared in Section 8(5) of the 1935 Act and reappears in the 1947 Act within the language of Section 8(a)(5) and 8 (b)(3), codified as 29 U. S. C., Secs. 158(a)(5) and 158(b)(3).

As defined by Section 158(d) of Title 29, such collective bargaining consists of "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party."

Clearly, the Joint Industry Board in the present case is not the "representative of the employees" for purposes of *dealing* in the sense of *negotiating* or *bargaining collectively* with the employers with respect to the making of an agreement or contract relating to wages, hours or

working conditions or with respect to grievances, labor disputes, or questions arising under the collective bargaining agreement. No such allegation was made by the "Complaint" herein which merely alleged that the "International Association, Local Union No. 104, Local Union No. 75 and W. R. White are representatives of the employees of plaintiffs." [R. 8.] The "Answer" admits [R. 12-13] and paragraph 2 of the "Stipulation of Facts" recites [R. 17] only that Local 104 is the "representative of the employees of plaintiffs." Although the "Stipulation of Facts" recites in paragraph 4 [R. 18] that Local 75 is the "representative of employees" of "employers, other than the plaintiffs", this Honorable Court concluded that Local No. 75 was acting "on behalf of these members of Local 104 temporarily in the northern counties and in respect to the working conditions and wage scales of these 104 members" and "was participating in the Joint Industry Board on behalf of the plaintiff's (sic) employees or some of them" when that local "made the deal for the 2½¢ per hour and when it undertook to call a strike of the Local 104 members in respect to the northern counties jobs." (Opinion, pp. 11-12.)

We respectfully suggest that upon the state of the record just outlined, it is clear that Locals 75 and 104 of the Sheet Metal Workers International are "labor organizations" within the meaning of subdivision 5 of Section 152, but it does not follow as a legal consequence that the Joint Industry Board exists wholly or partially for the purpose of "dealing with employers" so as to itself constitute a "labor organization", representing any employees of the appellant employers.

VI.

Participation by a Bona Fide Labor Union in a Jointly-Controlled Labor-Management Board Is Not Equivalent to Employee Participation in a Labor Organization.

This Honorable Court concluded in its opinion (p. 11) that the Joint Industry Board was "an organization in which employees participate" within the meaning of 29 U. S. C., Sec. 152(5) because certain San Francisco employees of eight of the plaintiffs (members of Local 104 temporarily employed in the six northern counties) were then being represented by Local No. 75 for certain limited purposes.

The "clear legislative intent" that "participation by representation would satisfy the meaning of this definition as applied to the problem here presented" which this Honorable Court thus found to exist (Opinion, p. 11), does not appear to be reflected by the history of the legislation, either during Congressional consideration of the original Wagner Act of 1935 or during the Taft-Hartley Act debates of 1947.

The broad definition of a "labor organization" in Section 152(5) of Title 29 to include "any organization of any kind, or any agency or employee representation committee or plan in which employees participate" was initially adopted, as shown by the legislative history, in conjunction with the prohibition of Section 8(2) of the original Wagner Act, which now appears as 29 U. S. C., Section 158(a)(2) making it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."

When the House Labor Committee recommended the continuation of such a prohibition against employer domination of, or interference with "any labor organization" in the Hartley bill in 1947 (Section 8(a)(2) of *H. R. 3020, 80th Cong., 1st Sess.*), it reported that . . .

> "During World War II, many employers, with the help of the Government, set up labor-management committees with which they discussed matters of mutual interest . . . but section 8(a)(1) and (2) forbid the employer to create a formal organization having members among employees generally or other common characteristics of a labor union." (*House Report No. 245, 80th Cong., 1st. Sess.*, p. 33.)

The Hartley bill, as passed in the House of Representatives on April 17, 1947 would have extended the prohibition against an employer contributing financial support directly to a "labor organization" by forbidding the employer to make "payments of any kind" to "any fund or trust established by such organization, or to any fund or trust in respect of the management of which, or the disbursements from which, such organization can, either alone or in conjunction with any other person, exercise any control directly or indirectly." (Section 8(a)(2)(c)(ii) of *H. R. 3020, 80th Cong., 1st Sess.*) This amendment forbidding payments by employers to "any fund over which the union has any control even though it is jointly administered with the employer" was rejected by the Senate and thus not included in the final measure. (See Appellees' Br. pp. 16-18 for the detailed legislative history.)

Thus, the Congress itself recognized that a jointly-administered fund or trust in which "employees participate

through the union that represents them" does not constitute a labor organization "in which employees participate" so as to preclude an employer from contributing financial support to such fund or trust.

While a national labor federation such as the American Federation of Labor and the Congress of Industrial Organizations is concededly a "national or international labor organization" composed of constituent unions through which individual employees may be said to obtain "participation through representation" (*N.L.R.B. v. Highland Park Mfg. Co.*, 341 U. S. 322), there is no legal precedent for converting a joint labor-management board into a "labor organization" because it is operated on a bi-partite basis by representatives of an employer association and a bona fide labor union not itself subject to employer domination or receiving financial support by an employer.

VII.

The Joint Industry Board Is Not a Part of Any Labor Union nor a Mere Adjunct Thereto.

This Honorable Court rejected the argument of appellees that the Joint Industry Board was an "independent unit or entity", concluding that, under "the special and peculiar provisions of this so-called trust agreement", the Board was a "mere adjunct of the union" because "the union members of the board were required to act separately, by their own majority" and were "subject to recall or discharge at the will of the union." (Opinion, pp. 14-15.)

In so deciding, the Court apparently overlooked the fact that Congress deliberately rejected the Senate proposed definition of "representative" in adopting Section 302,

which would have included "any organization or fund of which some of the officers are representatives or are members of a labor organization or are elected or appointed by a representative." (See Appellees' Br. pp. 18-19.) Moreover, as finally adopted, Section 302(c)(5) expressly approved of trust agreements for welfare funds under which "employees and employers are equally represented in the administration of the fund" by "two groups" of trustees, specifically designated as "employer and employee groups." Because of the likelihood of unit voting by these two groups, Congress also prescribed the method by which an impartial umpire could "decide such dispute" or "break such deadlock" whenever "the employer and employee groups deadlock on the administration of such fund." (It is significant that the statute thus contemplated "group" voting among the trustees and does not speak of a tie-vote among the individual trustees. The selection of the impartial umpire is thus required to be made by agreement of "the two groups" or by appointment of the appropriate district court "on petition of either group".)

Far from being "special and peculiar", the group voting provisions of the Joint Industry Board Trust Agreement merely reflect the pattern prescribed for welfare fund trusts by Section 302 itself. As the trial court herein expressly found . . .

> "The Board consists of six members for the employers and six members for the union. Decisions of the Board are made by a concurrence of a majority of the employer members with a majority of the union members. . . . [*T*]*he power to expend the funds contributed by the employers, resides in the Board, and is thus dependent upon the approval of the employer members.*" [R. 43, emphasis added. *Cf.*, Opinion, pp. 9-10.]

> *"If the employer members refuse to sanction an expenditure for any reason, there is a provision for arbitration in the agreement."* [R. 48, emphasis added. *Cf.,* Opinion, pp. 14-15.]

When it concluded that "Action could be taken only if the union members as such, by a majority of those representing the union, agreed to it" and that in case of a dispute referred to the Joint Industry Board for settlement the point made by the employer could only be conceded "by union action through vote of a majority of the union members" (Opinion, p. 15, footnote 8 and accompanying text), this Honorable Court apparently overlooked the terms of the Trust Agreement whereby deadlocks among the members of the Board may be resolved by "an impartial person who shall act as arbitrator" to be designated by the President of the University of San Francisco, if not mutually selected by the two groups within a specified reasonable time. [Paragraph O, R. 40.]

The assumption that the union-appointed trustees "were compelled to take orders from the union" or that "the individual members of the Board could not act independently or exercise an independent judgment or act as representatives of a separate entity or organization" is not supported by any evidence in the record. (Opinion, p. 15.) All that was before the Court as to the conduct of these trustees was a stipulation establishing the fact that the Northern Counties Employers' Association and Local 75 each respectively "nominated and appointed" six designated persons as "trustees of said trust" and "said persons so named accepted said nominations and appointed and were and are acting as such trustees." [R. 19.] Appellees would welcome the opportunity to have this matter remanded for the purpose of presenting

evidence as to the true facts regarding the operation of the Joint Industry Board which would conclusively demonstrate the independence of judgment exercised by the individual trustees and wholly dispell any doubt as to the ability of the union-appointed Board members to fulfill their fiduciary obligations in an objective manner without being subjected to any "orders from the union." Upon such a remand, appellees would be prepared to present proof of a number of specific cases where "the point made by the employer" was in fact "conceded" without regard to "union action" as such.

Even on the basis of the record as it now stands there is substantial evidence to support the express finding of the trial court that all the members of the Joint Industry Board "will hold the funds in question in trust for the purposes enumerated in the trust agreement." [R. 46.] By declining to pass upon the question as to whether a true trust was here established (Opinion, p. 14), this Honorable Court has failed to consider material circumstances and legal arguments raised by appellees regarding the establishment of the trust fund; the enumerated purposes of the trust; the powers, duties and fiduciary obligations of the trustees; and the beneficial interest of the individual employees and employers in the objects of the trust fund. (See Appellees' Br. pp. 38-65.)

When this Honorable Court concluded that the Trust Agreement provisions regarding revocation of the designation of any representative on the Board at any time at the will of the party making the appointment [Paragraph B-3, R. 32] were "special and peculiar", it apparently did not have in mind the fact that such provisions are not at all unusual in the case of joint labor-management trust funds established by collective bargaining agree-

ments on a multi-employer basis, because of the practical and legal necessity for "equality in administration." (See Appellees' Br. pp. 40-41.)

Local 75 did not and does not regard the Joint Industry Board as if it were a feature of the union itself nor does it construe the Trust Agreement as creating the Board as a "mere adjunct of the union." (*Cf.* Opinion, p. 15.) As the trial court herein expressly found, the Trust Agreement "expressly provides for the separate character of the Board from either of the parties and expressly preserves their duties and relationships with respect to each other and each of them with respect to their members." [R. 47. See also Par. A-5 of the Trust Agreement, R. 31 and Par. O, R. 39.] The functions and procedures of the Joint Industry Board go beyond the collective bargaining activities of the Local Union on behalf of its members, and provide valuable services for all persons engaged in the Heating and Sheet Metal Industry in the Northern California counties whether as employees, applicants for employment, or employers. (See Appellees' Br. pp. 63-65.)

The fact that Local 75 supports the separate and distinct institution of the Joint Industry Board as a desirable means of furthering industrial peace and economic stability in the Heating and Sheet Metal Industry of the six northern counties does not vitiate the finding of the trial court herein that "The Joint Industry Board is not a part of the union. . . ." [R. 47.] Neither, we submit, does the fact that Local 75 may have threatened to induce strike action to compel payment of the agreed-upon 2½¢ per hour dictate a contrary finding. Would a union's threat of economic action to compel payment of agreed-upon employer contributions to defray

the expense of a jointly-administered medical insurance or pension plan for the purpose of enforcing the collective bargaining agreement convert that plan into a mere creature of the union?

It is true in the present case, as in the *Essex Transportation Co.* case, *supra,* 216 F. 2d at pp. 412-413, that the members of the Joint Industry Board "were chosen half and half by the employers' association and this union" and that they function as "two groups" jointly administering a labor-management trust fund, in accordance with "the type of arrangement which has met with legislative sanction, judicial approval and is a growing trend in employer-employee relations." There is however, no claim that this arrangement has resulted in any diversion of trust funds to the union or any of its officers or representatives, or that the express safeguards in the Trust Agreement in the form of joint control and mutual administration by the two groups of employer-appointed and union-appointed trustees which are equal in number and voting power have proved inadequate to prevent such diversion. The Trust Agreement provides for "a careful accounting and separate deposit system for Joint Industry Board Funds from those of the union." [R. 47.] If any diversion of funds to the union or its officers or any intermingling of funds with those of the union were conceivable in the face of these safeguards, the District Court would clearly have jurisdiction to "enjoin the trustees from making the improper expenditures." [29 U. S. C., Sec. 186(e). See *Upholsterers' International Union v. Leathercraft Furniture Co.,* 82 Fed. Supp. 570, 573, quoted by the trial court herein at R. 47.]

We respectfully urge that a re-examination of the provisions of the Trust Agreement discussed hereinabove should lead this Honorable Court to reconsider its conclusion that the Joint Industry Board is merely a part of the union and as such a "representative" of the employees within the meaning of Section 502.

Conclusion.

Upon all the grounds stated in our petition and the foregoing argument in support thereof, Appellees respectively urge this Honorable Court of Appeals to grant a rehearing herein as prayed for.

Dated: Los Angeles. California, October 14, 1957.

Respectfully submitted,

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By ROBERT W. GILBERT,

Attorneys for Appellees.

No. 15,361

IN THE

United States Court of Appeals

For the Ninth Circuit

JOSEPH J. PARENTE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S REPLY BRIEF.

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Subject Index

Table of Authorities Cited

Rules

No. 15,361

IN THE

United States Court of Appeals

For the Ninth Circuit

JOSEPH J. PARENTE,
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vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S REPLY BRIEF.

JURISDICTION.

Jurisdiction is invoked by appellant.

21 U.S.C. §134 (sic);

26 U.S.C.A. §§4704 and 4237; and

18 U.S.C. 375 (sic).

It appears that appellant Parente was indicted under *Section 371 of Title 18 United States Code,* conspiracy to sell and conceal narcotic drugs. Appellant is appealing from the judgment of conviction on this charge.

STATEMENT OF THE CASE.

Appellant was indicted on May 2, 1956 for conspiracy to sell and conceal narcotic drugs. One Jones Chesley White was charged in the first and second counts of the same indictment with the sale of some 10 ounces of heroin and the concealment of approximately 25 ounces of heroin. The conspiracy count of the indictment charged appellant, White and one Martin Bert Haley. White, Haley and appellant went to trial before a jury on July 23, 1956. On July 25 the jury returned a verdict of guilty as to White and appellant and were unable to come to a decision as to the guilt of Martin Bert Haley. Appellant Parente was sentenced on July 30 to a term of four years and received a $100 fine. Appellant appeals from this judgment of conviction.

Appellant's conviction resulted from a conspiracy to sell and conceal heroin which resulted in the delivery of approximately 10 ounces of heroin to a State narcotic agent on March 10, 1956 by the defendant White (Tr. 10-16). This sale of heroin was purportedly made by White to Agent McBee of the State Bureau of Narcotics and one Evo Cardella (Tr. 11) who was operating as an informer for the State Bureau of Narcotics (Tr. 14).

The defendant White had given a full confession concerning his part in the conspiracy to Agent Grady of the Federal Bureau of Narcotics (Tr. 99). In a signed and witnessed statement, White stated that he arrived in the United States from Guam on February 4, 1956 with approximately 27 ounces of heroin (Tr.

99-100); that he went to Las Vegas, Nevada on February 12 (Tr. 101), and met Joseph Parente some two or three days later at a horse betting parlor (Tr. 101). White further stated that after telling Parente of his heroin, Parente told him that he would come to San Francisco and find a reliable person to purchase the narcotics (Tr. 102). On February 22, according to White, Parente contacted him and arrangements were made to go to San Jose to meet a customer for heroin (Tr. 102, 103). In San Jose, Parente, according to the statement, introduced one Cardella to White as a prospective purchaser of narcotics (Tr. 103). This introduction took place on February 23, 1956 (Tr. 104). This statement was offered and admitted in evidence only against the defendant White (Tr. 99).

Evo J. Cardella testified at the trial (Tr. 42). According to his testimony he was introduced to appellant on the 22nd or 23rd of February by appellant's codefendant Haley (Tr. 45). After his introduction to Mr. Parente, appellant Parente stated: "I'll take you across the street and meet the fellow that has the stuff and we walked across the street." (Tr. 47.) Across the street, Cardella testified, they met defendant White (Tr. 47). Appellant Parente then introduced Cardella to White and said: "I will leave you two fellows with your business." (Tr. 48.) Immediately thereafter Cardella and White commenced negotiations for the purchase of White's heroin (Tr. 49). An agreement was reached for White to deliver to Cardella sample of the heroin (Tr. 49). On the next

day White brought an ounce of narcotics to Cardella and told him that this was a sample (Tr. 52). Cardella further testified that he met White together with Agent McBee, at which time he introduced McBee as a prospective purchaser of narcotics (Tr. 57-58).

On cross-examination Cardella again testified that appellant Parente had informed him he was going to introduce him to the man that had the "stuff" and did, in fact, introduce him to appellant's codefendant White (Tr. 71, 85). One Agent Goodman of the Federal Bureau of Narcotics testified concerning a conversation he had with appellant, in which he informed appellant of White's arrest. At that time appellant Parente stated: "Tell me, did White do any talking?" (Tr. 122).

Appellant made a motion to strike at the conclusion of the Government's case (Tr. 148). Thereafter the defense presented their case. Defendant Haley testified that on February 23 he had a conversation with Parente in which appellant stated: "A gentleman by the name of White has some stuff that he wanted to get rid of." (Tr. 160). Thereafter Haley testified he introduced Cardella to appellant (Tr. 164, 186).

Appellant testified in his own defense that he had never even met Cardella (Tr. 200). He denied that he was introduced to Cardella by Haley (Tr. 200). He also denied telling Haley that his codefendant White had some "stuff". He admitted meeting White in Las Vegas (Tr. 194). He claimed that the only knowledge he had of White dealing in contraband was

in connection with some jewelry (Tr. 197, 198). He admitted calling White from Las Vegas on February 21 (Tr. 211). He denied introducing White to Cardella (Tr. 216).

ARGUMENT.

I.

THE EVIDENCE WAS SUFFICIENT.

The conspiracy in this case resulted in the delivery of approximately ten ounces of heroin on March 10, 1956 (Tr. 10 through 16). This sale of heroin was made to Agent McBee of the Bureau of Narcotics and Ebo Cardella (Tr. 11). The delivery of one ounce of heroin was made to Cardella on the 24th of February (Tr. 49). The deliveries were made to appellant's coconspirator White. Those deliveries were made, however, as a result of appellant Parente's bringing into contact Cardella and White. But for Parente's introduction of the customer Cardella to the seller White, no violation of the narcotic laws, at least one involving Cardella, would ever have occurred.

The sixth overt act of the indictment charges that Parente introduced Cardella to the defendant White. This act was an act in pursuant of the conspiracy to violate the narcotic laws. The substantive offenses which are charged in the first and second counts of the indictment could not have occurred were it not for the act of introduction performed by appellant

Parente. White, of course, had confessed the whole conspiracy. This evidence was, however, not admissible against Parente and the jury was so instructed (Tr. 99). Evidence admissible against Parente, however, showed that White and appellant met in Las Vegas, Nevada (Tr. 194). A phone call was made to White on his return from San Francisco from Parente in Las Vegas (Tr. 211). Subsequently Parente came to California (Tr. 45). Appellant's codefendant Haley testified that on February 23, Parente told him that White had some stuff "that he wanted to get rid of." Both Haley and Cardella both testified that Parente was introduced to Cardella in Haley's bar (Tr. 45), 164, 186.

The act most calculated to effect the object of the conspiracy, that is a sale of heroin, was then committed by appellant. Parente brought together the prospective purchaser of narcotics and the seller thereof (Tr. 47, 48).

Appellant's knowledge of the consequences of this act are shown by his statement to Cardella concerning "stuff". Before introducing White and Cardella Parente stated: "I'll take you across the street and meet the fellow that has the 'stuff' . . ." (Tr. 47). At the time of the introduction appellant stated: "I'll leave you two fellows with your business." (Tr. 48). "Stuff" is, of course, the universally used pseudonym for narcotics. Appellant's statement that he would leave White and Cardella to their business indicates his knowledge that a commercial transaction with respect to "stuff" was to take place.

Parente's act in introducing Cardella and White furthered the general conspiracy to sell narcotics and made possible a specific sale, that is the sale between White and Cardella as to the ounce sample of narcotics and the 10-ounce sale which took place in March. The jury could properly infer that Parente was aware of the consequences of his act of introduction from his statements concerning "stuff" and business. If a defendant aids a conspirator or conspiracy, knowing in a general way the purpose is to break a law, a jury may infer that he entered into an agreement with him.

McDonald v. United States (8th Cir.), 89 F.2d 128;

Galatas v. United States (8th Cir.), 80 F.2d 850;

Marino v. United States (9th Cir.), 91 F.2d 691.

In appellant's actions we have evidence of an acting in concert in pursuance of a common design toward the accomplishment of a common purpose. Evidence of such action in concert is sufficient to show a conspiracy.

American Tobacco Co. v. United States, 328 U.S. 781;

Marino v. United States, supra;

Coates v. United States, 50 F.2d 173-174.

A conspiracy, of course, may not be proved by the act and declaration of a co-conspirator alone. There must be evidence aliunde before the acts and declarations of one co-conspirator are admissible against another.

Glasser v. United States, 315 U.S. 60.

Appellant's introduction of Cardella to White as the man who had the "stuff" forms the necessary independent evidence of appellant's knowledge of the nature of a conspiracy and his intention to cooperate for the accomplishment of its unlawful end. White's act in delivering and selling narcotics and carrying on negotiations for the attainment of that end showed that a conspiracy in fact existed.

The sale and distribution of narcotic drugs requires both a supply of narcotics and connections to distribute that supply. White and Parente each supplied an indispensible element for the accomplishment of the conspiracy. White had heroin. Parente knew people and was able to come into contact with people who were interested in purchasing heroin. What occurred on February 23 was sufficient evidence for the jury to find that an unlawful agreement in fact existed between White and Parente. This court is, of course, not concerned with the weight of the evidence before the jury. All that is required is that there be substantial evidence in the record indicating that appellant engaged in a conspiracy.

Glasser v. United States, supra;

Gage v. United States (9th Cir.), 167 F.2d 122, 124;

Barcott v. United States (9th Cir.), 169 F.2d 929, 931, cert. denied;

United States v. Socony Vacuum Oil Co., 310 U.S. 150, 254.

Appellant's only argument against considering the tesitmony of Cardella concerning appellant's introduc-

tion of Cardella to White is that the conspiracy had ended at the time of the introduction. (Appellant's Brief, page 15.) To be sure, the act and declarations of a co-conspirator are *not* admissible against a defendant after the termination of a conspiracy. However, there must be some showing that the conspiracy is ended and the burden is, of course, on the conspirator to so show.

Krulewitch v. United States, 336 U.S. 440.

In the instant case the conversation referred to by appellant took place prior to the sale of narcotics which was the object of the conspiracy. There is no evidence that appellant took any affirmative steps to leave the conspiracy prior to the sale. In fact, appellant's actions in bringing together a prospective purchaser and White shows only an intent that a sale be consummated and has no tendency to show a withdrawal from the object of the conspiracy whatsoever. The fact that appellant did not desire to be present when the narcotics were passed shows his caution rather than his lack of desire to effectuate a sale of heroin.

Since there was evidence in the record independent of any acts and declarations of White showing appellant's indispensible connection with the conspiracy and since appellant's knowledge of the existence of the conspiracy was also shown by his statements made prior and during his introduction of Cardella to White, we submit that the evidence was sufficient for the jury to infer that he had entered into a conspiracy to conceal and sell heroin.

II.

THE DECLARATIONS OF WHITE IMPLICATING PARENTE IN THE CONSPIRACY WERE ADMISSIBLE.

Appellant objects to the admission in evidence of two declarations of his co-conspirator White made during the existence of the conspiracy. Agent McBee testified that White had told him that he could not come down from a $400 price because "he and a person by the name of Joe Parente were in it together and therefore he couldn't cut the price." This statement was, of course, admissible against the defendant White and since the defendant White was also on trial, could hardly have been excluded by the court. It is, however, well established law that the admissions of one partner tending to establish the existence of a conspiracy are admissible against the other partner.

Greer v. United States, (10th Cir.), 227 F.2d 546, 548;

In *Neal v. United States* (D.C. Cir.), 185 F.2d 441, cert. den., evidence was admitted of declarations by a co-conspirator who had delivered the narcotic that he had delivered marijuana cigarettes instead of marijuana because the defendant there said he was unable to get bulk marijuana. In *United States v. Compagna* (2nd Cir.) 146 F.2d 544, the conversations of a co-conspirator which incidentally touched on the appellant's part there in the conspiracy were also held to be admissible. The court held that this evidence was admissible since independent evidence had been admitted of the defendant's connection with the conspiracy.

The declaration of co-conspirators are admissible against each other because one is the agent of the other. As the court in *United States v. Sansone,* (2d Cir.), 231 F.2d 887 stated:

> ". . . and since co-conspirators have an identity of interest, the admissions of one member have probative value against another and hence are admissible as evidence against the other." (Tr. 892).

The declaration above referred to formed part of the crime itself. The statement was part of the negotiations for the sale. Hence it was admissible in evidence.

The other declaration objected to was a statement of the witness Cardella that when White brought him the ounce sample of heroin and Cardella told White that he didn't want that much, White told him "that Mr. Parente told him to go ahead and bring an ounce up". This conversation was part of the crime itself. It also formed essential evidence of the negotiation for the sale of heroin. It was a declaration and pursuant to the object of the conspiracy.

Evidence of the declaration of one member of a conspiracy in the absence of the other is admissible when it is shown (1) that a conspiracy is in existence, (2) that the appellant is connected therewith, (3) that the declaration was made during the existence of the conspiracy, and (4) that it was in furtherance of the conspiracy.

United States v. Sansone, supra, at 892.

Here the existence of the conspiracy was shown by appellant's bringing into contact purchaser and seller of heroin; and the sale of heroin which actually resulted. Appellant was shown by independent evidence to be connected with the conspiracy by his acts and declarations but for which the unlawful sale of heroin could not have resulted. The conspiracy was not shown to have terminated. The conversation itself was concerned with the very sale which was the object of the conspiracy. The evidence was therefor admissible.

III.

THE ORDER OF PROOF IS IN THE DISCRETION OF THE COURT.

There can be no more well-established rule than that the order of the proof of a conspiracy case is within the discretion of the trial judge.

Newman v. United States (9th Cir.), 156 F.2d 8;

United States v. Pugliese (2d Cir.), 153 F.2d 497, 500;

United States v. Sansone, supra.

Whether or not the testimony of Agent McBee concerning the acts and declarations of the defendant White was admissible against Parente does not depend on whether appellant's connection with the conspiracy was shown before or after the McBee testimony was admitted. The only question involved is whether the evidence aliunde referred to in the *Glasser* case, supra, was present.

As we have previously indicated, there is abundant evidence showing Parente's part in the conspiracy. The order of proof, therefore, in a case involving three defendants was unimportant. If at the conclusion of the case there was no evidence against Parente, then, of course, the court should have granted a verdict of acquittal. However, there was evidence against Parente connecting him with the conspiracy and, therefore, the acts and declarations of his co-conspirators were admissible against him.

The court admitted this evidence subject to a motion to strike. It could have admitted the evidence only against some defendants and then at the conclusion of the case after appellant's connection with the conspiracy was shown admitted the evidence as to him. One method of treating this evidence was as good as the other so long as there was independent evidence against appellant. Independent evidence did show that appellant was an essential part of the conspiracy.

IV.

APPELLANT HAS FAILED TO COMPLY WITH RULE 30.

In Specification of Error No. 8, appellant objects to the failure of the court to give instructions concerning the admissiiblity of both the acts and declarations of co-conspirators and also concerning the admissibility of co-defendant White's confession.

Appellant has not included in the record on appeal the charge of the court. It is, therefore, impossible

for the court to determine what instruction the trial court gave. He has not complied with Rule 18(2)(d) of this court, which provides: "When the error alleged is to the charge of the court, the specifications shall set out the part referred to in totidem berbis, whether it be in instructions given or instructions refused, together with the grounds of the objections urged at the trial. In a number of cases this court has indicated that where this is no compliance with Rule 18(a)(d) the court may disregard the claim of error.

Gordon v. United States (9th Cir.), 202 F.2d 596;

Lee v. United States, 238 F.2d 341;

Mitchell v. United States, 213 F.2d 951, 957;

Kobey v. United States (9th Cir.), 208 F.2d 583.

Furthermore, it does not appear that appellant at any time either objected to any instructions of the court or requested any instructions. Therefore, as to instructions of the court, appellant has waived any error.

Brown v. United States (9th Cir.), 222 F.2d 293, 298;

Kobey v. United States, supra;

Hersog v. United States (9th Cir.), 235 F.2d 664;

Rule 30, Federal Rules of Criminal Procedure.

Appellant objects in some way in his brief to the instruction of the court with respect to the confession against White. Whether or not the court instructed

the jury concerning evidence submitted against one defendant and not against the other does not appear, since appellant has failed to include the record of the charge to the jury. In the absence of such a record the court should presume that a proper instruction was given. *U.S. v. Vanegas* (9th Cir.), 216 Fed. 657.

At the time of the introduction of this evidence, Mr. Riordan, counsel for the Government, stated: "Your Honor, at this time we will offer in evidence this statement as against the defendant White alone." (Tr. 98). The court at that time stated: ". . . It is being received only as against the defendant White. And when evidence is introduced as to one defendant and not as to other defendants, the jury will consider it only as against a defendant against whom it is offered." (Tr. 99).

What further appellant desired the court to instruct does not appear in either appellant's brief or in the record of the trial. Appellant made no objection and thus does not comply with Rule 30 at the time of trial and in his brief he nowhere states in what respect the court's instruction was inadequate nor has he complied with Rule 18(2)(b).

Appellant's objections directed to the admission of the conversation between Cardella and White appearing at page 49 of the Transcript are subject to the same infirmities. Appellant did not request an instruction at the time the evidence was introduced. He has not included the charge of the court at the conclusion of the evidence. He has not even suggested

in his brief what instruction he desired the court to give and he has, of course, not complied with either Rule 30 of the Federal Rules of Criminal Procedure or Rule 18(2)(d) of this court.

V.

THE USE OF THE WORD "STUFF" BY APPELLANT WAS PROPERLY ADMITTED.

The word "stuff" is universally used by dope peddlers to refer to narcotics. This court has decided literally hundreds of cases in which this slang expression for dope has been used. Appellant has objected in two different instances where there is testimony the appellant used the word "stuff".

Appellant's first objection is directed to defendant Haley's testimony concerning Parente's use of the word. At page 160 of the Transcript, the record reads as follows:

> "Q. Will you tell the Court and the jury what Mr. Parente said and what you said at that time and place?
>
> A. Mr. Parente said a gentleman by the name of White has some stuff that he wanted to get rid of. I told Mr. Parente 'I don't want nothing to do with it and get Mr. White out of my place.' "

No objection was made to this question and answer. At page 175 of the Transcript Haley was asked on cross examination "What did you understand Parente

to mean by 'stuff' ''. The answer was: "I thought maybe he meant some narcotics." (P. 176). Since the word had been used by Haley previously without objection by appellant, any claim of error might be deemed waived.

What Haley understood by appellant's use of the word, however, was relevant and admissible. When a word is used in a sense which has connotations different from its ordinary meaning, a witness may testify what his understanding of the term was in relation to the circumstances in which the word was used and the person who used it. Haley was a long time acquaintance of appellant. He also testified concerning a conversation he had with appellant. He knew because of his friendship with Parente what appellant ordinarily meant when he used certain expressions. Furthermore, he was in a position to know the essential flavor that the circumstances of the conversation gave to the words actually used. As was stated in *Batsell v. United States* (8th Cir.), 217 F.2d 257: "While the ordinary rule confines the testimony of a lay witness to concrete facts within his knowledge or observation, the court may rightly exercise a certain amount of latitude in permitting a witness to state his conclusion based on common knowledge and experience."

In the *Batsell* case, a witness testified that the defendant's use of the word "job" was thought by the witness to mean prostitution. The court held that the witness, a friend of the defendant, was in a position to know the sense in which the term was used.

Appellant did not choose to deny that he used the word in a sense testified by the witness. He simply denied the conversation altogether. Appellant had an opportunity to cross examine the witness Haley as to the basis of his conclusion that Parente meant heroin by his use of the word "stuff". Appellant did not choose to exercise that opportunity.

Appellant's second objection to the use of the word "stuff" was at pages 46 and 47 of the Transcript where Cardella testified that appellant Parente told him that "I'll take you across the street and meet the fellow that has the 'stuff' ". (Tr. 47). Appellant objects to this testimony on the grounds that it was in response to a leading question. However, the record reveals that an objection to one of the questions in the series was sustained on the grounds that it was leading. At the time the objected-to answer was received, the question was: "State the conversation." We do not understand how a question could be any less leading. Furthermore, there was no question on the part of Government counsel in which the word "stuff" is used.

Appellant, on page 110 of his brief, makes an accusation that the witness Cardella had been coached and "forgot his lines." Appellant cites no evidence in the record to support this accusation. There is no inference that can be so made from the testimony in the record. It would appear to us that such an argument, if it can be called that, would be better directed to a jury than to this court.

VI.

THE OFFER OF THE STATE GRAND JURY TRANSCRIPT WAS PROPERLY REFUSED.

Appellant at the commencement of his case in chief, offered a copy of the reported transcript of agent McBee's testimony before the State grand jury. This offer was refused on the grounds that a proper foundation for impeachment was not laid at the time the witness was on the stand.

As was stated in *United States v. Angelo* (3rd Cir.), 153 F.2d 247 at 251: "Moreover, it has long been held that a condition precedent to a direct contradiction of a witness by what he has said on a previous occasion is the laying of a proper foundation." This court has held that when a prior inconsistent statement is used for the purpose of impeachment, the statement must first be related to the witness along with the circumstances of time, place, and persons present, and the witness asked if he made the statements and given an opportunity to explain them.

Zamora v. United States (9th Cir.), 112 F.2d 631, 634;

Osborne v. United States (9th Cir.), 17 F.2d 246, 250.

In the *Zamora case,* the evidence offered was testimony at a preliminary hearing and there as here the witness admitted that he had testified at the proceeding, but no further foundation was laid. See also *Buston v. United States* (5th Cir.), 175 F.2d 960, 965 where grand jury testimony was involved.

Furthermore, it should be mentioned that there is nothing in the record to indicate that McBee's testimony before the State grand jury was in any way inconsistent with his testimony at this trial. Appellant did not mark the grand jury testimony for identification. He did not make any offer of proof of its contents and he did not establish to the witness McBee that McBee had made any statements to the grand jury contradicting his statements at the trial.

The offer of the grand jury transcript was therefor properly refused.

VII.

THE "JEWELRY" EVIDENCE WAS PROPERLY TREATED BY THE COURT.

Appellant's 11th Specification of Error reads as follows: "The court is guilty of prejudicial error in refusing to admit evidence against another crime than the one charged as a defense. In refusing to permit counsel for appellant to establish that in truth and fact appellant was only informed about and had interest in jewelry."

Appellant attempted to introduce into evidence some customs records having to do with apparently a seizure of jewelry (Tr. 152-153). A stipulation, however, was entered into as follows: "Counsel stipulated that he did have some jewelry that was taken from him by the customs officers." This in essence was all that the defense could possibly have wanted. Not only was the fact that appellant was attempting to prove allowed in evidence, but this fact was made

binding on the jury by a stipulation. Appellant can point to no place in the trial that the court refused him an opportunity to press his defense that he was only interested in helping White dispose of contraband jewelry and not aware or interested in helping White distribute heroin.

At the time that the jewelry itself was offered, appellant had not yet taken the stand nor had any foundation for the jewelry's admissibility been laid. The court by requesting and receiving a stipulation gave appellant far more than he was entitled to on the record as it then stood.

CONCLUSION.

All evidence was properly admitted against appellant. The court properly refused to admit the evidence of the grand jury transcript and the jewelry of defendant White and the evidence was sufficient to convict appellant.

The judgment of the District Court should be affirmed.

Dated, San Francisco, California,
July 1, 1957.

LLOYD H. BURKE,
United States Attorney,
JOHN H. RIORDAN,
Assistant United States Attorney,
RICHARD H. FOSTER,
Assistant United States Attorney,
Attorneys for Appellee.

No. 15365

United States
Court of Appeals
for the Ninth Circuit

SHELL OIL COMPANY, a Corporation,

Appellant,

vs.

LANUS WAYNE PRESTIDGE,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Idaho
Eastern Division

FILED
MAR - 6 1957
PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—2-22-57

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Attorneys for Appellant.

GLENN A. COUGHLAN,
327 Idaho Building,
Boise, Idaho;

Attorney for Appellee.

In the District Court of the United States, in and for the District of Idaho, Eastern Division

No. 1876

LANUS WAYNE PRESTIDGE,

Plaintiff,

vs.

SHELL OIL COMPANY, a Corporation, ROCKY MOUNTAIN OIL CORPORATION, a Corporation, and STONY POINT DEVELOPMENT, INC., a Corporation,

Defendants.

COMPLAINT

Plaintiff complains of the defendants and for cause of action alleges:

I.

That plaintiff is a resident of the State of Idaho.

II.

That the defendant Shell Oil Company is a corporation incorporated under the laws of the State of Delaware and is authorized and licensed and qualified to do business in the State of Idaho.

III.

Defendant Rocky Mountain Oil Corporation is a Colorado Corporation doing business within the State of Idaho without authorization and without the appointment of a statutory agent as required by law.

IV.

The Stony Point Development Company, Inc., is a Colorado Corporation which operates within the State of Idaho without authorization and without the appointment of a statutory agent as required by law.

V.

The matter in controversy herein exceeds, exclusive of interest and costs, the sum of $3,000.00.

VI.

That on or about the 2nd day of June, 1954, the defendants were engaged in oil well drilling operations approximately fifteen miles northwest of the City of Montpelier, Idaho.

VII.

That on the 2nd day of June, 1954, plaintiff was upon the defendants' premises at their invitation when they negligently, carelessly and recklessly poured oil upon an open fire, causing an explosion.

VIII.

That at the time and place above described as a direct proximate result of the said explosion, plaintiff was severely burned about his face and about his body, causing him painful and permanent injuries and disfigurement and requiring extensive and prolonged hospitalization and specialized medical care.

IX.

That ever since the injuries aforesaid, plaintiff has been unable to do or perform his usual manual labor and has thereby suffered loss of earnings, has become liable for hospital, medical care, treatment and sup-

plies in the sum of $1,800.00. Plaintiff has further suffered severe mental and physical pain and anguish and disfigurement and will in the future continue to suffer as a result of the permanent and serious nature of his injuries aforesaid.

Wherefore, plaintiff demands damages against the defendants as follows:

1. For special damages the sum of $1,800.00.
2. For general damages the sum of $100,000.00.
3. For costs and expenses incurred in this action.

/s/ GLENN A. COUGHLAN,
Attorney for Plaintiff.

Plaintiff demands that the above-entitled cause be tried before a jury.

/s/ GLENN A. COUGHLAN,
Attorney for Plaintiff.

[Endorsed]: Filed January 6, 1955.

[Title of District Court and Cause.]

No. 1876

MOTION TO DISMISS

The defendant Stony Point Development, Inc., a Corporation, moves the Court as follows:

I.

To dismiss this action against it because the complaint fails to state a claim against said defendant upon which relief can be granted.

II.

That nowhere in plaintiff's complaint is there any allegation of joint enterprise or mutuality of interest of the said three defendants.

III.

That nowhere in plaintiff's complaint is there any allegation as to which of said three defendants employed the agent who committed the alleged acts of negligence set forth in plaintiff's complaint.

IV.

That nowhere in plaintiff's complaint is there any allegation by which can be determined plaintiff's damages, if any, in this: That said complaint does not state facts from which can be determined plaintiff's past actual earnings, his potential probable future earnings capacity, nor his trade, occupation or industry by which can be determined his actual earning capacity.

/s/ G. STANDACHER,
Attorney for Defendant Stony
Point Development, Inc.

[Endorsed]: Filed January 31, 1955.

[Title of District Court and Cause.]

Civil No. 1876

MOTION FOR MORE DEFINITE STATEMENT

Shell Oil Company, one of the defendants above named, appearing for itself only and not for any other party named herein, moves this court for an order requiring a more definite statement from the plaintiff as to the following matters contained in the complaint filed herein:

(a) For a complete statement showing which of the above-named defendants were engaged in the oil well drilling operations described in VI of said complaint.

(b) A complete statement showing what person or persons poured oil upon the open fire described in VII of the complaint and a complete statement showing the relationship of such person or persons to the defendants above named and especially to this defendant.

Wherefore, This defendant asks that the above motion be heard and determined before it is required to plead further.

HAWLEY & MARCUS,

By /s/ CLAUDE MARCUS,

Attorneys for Defendant Shell Oil Company, a Corporation.

Service of Copy acknowledged.

[Endorsed]: Filed February 7, 1955.

[Title of District Court and Cause.]

File No. 1876

STIPULATION

Comes now, Glenn A. Coughlan, Attorney for the Plaintiff, and Claude Marcus, Attorney for the Defendant Shell Oil Company, and stipulate as follows:

That the Motion for More Definite Statement filed by the defendant Shell Oil Company in the above-entitled matter may be submitted to the Court at Boise, Idaho, at 10.00 a.m. March 14, 1955, or as soon thereafter as the same can be heard.

Dated this 21st day of February, 1955.

GLENN A. COUGHLAN,
Attorney for Plaintiff.

/s/ CLAUDE MARCUS,
Attorney for Defendant Shell Oil Company, a Corporation.

[Endorsed]: Filed March 2, 1955.

[Title of District Court and Cause.]

No. 1876-E. Civil

MINUTES OF THE COURT

March 15, 1955

This cause came on regularly this date in open court on plaintiff's Motion for Production of Docu-

ments and defendant's Motion for More Definite Statement, Glenn Coughlan appearing on behalf of the plaintiff and Claude Marcus appearing on behalf of the defendant.

After hearing counsel the Motion for Production of Documents was granted and defendant given 15 days to produce. The Motion for a More Definite Statement was denied and counsel were ordered to proceed by Interrogatories and the defendant was given 45 days to answer.

[Title of District Court and Cause.]

File No. 1876

ANSWER OF SHELL OIL COMPANY

The Shell Oil Company, a Corporation, one of the defendants above named, answers the complaint herein as follows:

First

Unless specifically admitted, this defendant denies each and every allegation contained in said complaint.

Second

This defendant replies to the separate paragraphs of said complaint as follows: Denies each and every allegation contained in paragraphs I, V and VII. Admits the allegations contained in paragraph II. Replying to paragraphs III and IV, this defendant does not have information upon which to form a

belief with respect to paragraphs III and IV and therefore deny the same. Replying to paragraph VI, this defendant admits that certain oil well drilling operations were being conducted on or about the 2nd of June, 1954, by one or both of the other defendants hereinabove named, but specifically denies that this defendant was engaged in such operations. Replying to paragraph VIII this defendant admits that said plaintiff was burned to some extent on or about said date, the extent of which is not known to this defendant, but alleges that such injuries were suffered by the plaintiff as a result of his own negligence and carelessness. Replying to paragraph IX, admits that said plaintiff incurred some expense in connection with his care and treatment, the amount of which is not known to this defendant and denies each and every other allegation therein contained.

Third

Further answering said complaint, this defendant alleges that it was not engaged in the oil well drilling operations described in said complaint; in no way controlled such operations; that the plaintiff was not injured on said premises by this defendant, and that this defendant in no way caused any injuries or damages which the plaintiff might have suffered.

Fourth

This defendant alleges that any injury which was sustained or suffered by plaintiff at the time and place and on the occasion mentioned in the com-

plaint was caused in whole or in part, or were contributed to by the negligence or fault or want of care of the plaintiff and not of any negligence on the part of this defendant.

Wherefore, This defendant respectfully prays that plaintiff take nothing under his complaint and that this defendant be given costs incurred herein.

HAWLEY & MARCUS,

By /s/ CLAUDE MARCUS,
Attorneys for Shell Oil Company, a Corporation.

Service of Copy acknowledged.

[Endorsed]: Filed March 20, 1955.

[Title of District Court and Cause.]

No. 1876

ANSWER

Comes Now Defendant Rocky Mountain Oil Corporation and hereby withdraws its Motion to Dismiss heretofore filed herein, and for Answer to plaintiff's Complaint herein admits, denies and alleges as follows:

I.

Admits the allegations contained in Paragraphs I, V and VI of plaintiff's complaint.

II.

Denies each and every other allegation contained in plaintiff's complaint on file herein not hereinafter specifically admitted.

Wherefore, defendant prays that plaintiff take nothing under his complaint filed herein and that defendant be awarded his costs incurred.

Dated this 2nd day of September, 1955.

ROCKY MOUNTAIN OIL CORPORATION;

By /s/ J. J. McINTYRE,
President.

Receipt of copy acknowledged.

[Endorsed]: Filed September 6, 1955.

[Title of District Court and Cause.]

No. 1876

STIPULATION AND ORDER

Comes now Glenn A. Coughlan, Attorney for plaintiff, and E. W. Windolph, President of defendant Stony Point Development, Inc., a corporation, and hereby stipulate as follows:

That the defendant Stony Point Development, Inc., a corporation, may be dismissed as a party defendant in the above-entitled action, each party to bear its own costs.

Dated this 2nd day of September, 1955.

/s/ GLENN A. COUGHLAN,
Attorney for Plaintiff.

/s/ E. W. WINDOLPH,
President of Stony Point Development, Inc., Defendant.

Order

The parties hereto having filed Stipulation for Dismissal of Stony Point Development, Inc., a corporation, and the Court being advised in the premises:

It Is Hereby Ordered that Stony Point Development, Inc., be, and the same is hereby, dismissed as a party in the above-entitled matter.

Dated this 7th day of September, 1955.

/s/ CHASE A. CLARK,
U. S. District Judge.

[Endorsed]: Filed September 7, 1955.

[Title of District Court and Cause.]

File No. 1876

INTERROGATORIES BY PLAINTIFF

To the Above-Named Defendant, Shell Oil Company:

You are hereby notified to answer under oath the interrogatories numbered 1 to 50 as shown below

within 15 days of the time of service is made upon you, in accordance with Rule 33 of Federal Rules of Civil Procedure.

1. Furnish true copy of U. S. Oil & Gas Lease Idaho 045 between you and Federal Bureau of Land Management.

2. Furnish true copy of Agreement dated the 26th day of December, 1952, and exhibits attached thereto, between you and Wheeler and Gray pertaining to Lot 2, Section 30, Tp. 12, SR 46 EBM.

3. Furnish true copy of Assignment from Wheeler and Gray to Rocky Mountain Oil Corporation executed March 6, 1953.

4. Furnish true copy of consent by you to the Assignment referred to in Interrogatory No. 3 executed August 7, 1953, by S. F. Bowlby.

5. Furnish true copy of Partial Assignment of Oil & Gas Lease between you and Rocky Mountain Oil Corporation executed July 15, 1953, pertaining to Lot 2, Section 30, Tp. 12, SR 46 EBM.

6. Furnish true copy of confirmation and assignment as to above Agreements and property dated on or about June 11, 1954, between you and Rocky Mountain Oil Corporation.

7. Did you do geological and title work on lands in connection with U. S. Oil & Gas Lease Idaho 045, and was the expense in connection therewith paid by you?

8. Was geological data and title data furnished by you to Rocky Mountain Oil Corporation concerning U. S. Oil and Gas Lease Idaho 045?

9. Did you on June 2, 1954, own leases to properties adjacent to Lot 2, Section 30, Tp. 12, SR 46 EBM, upon which the oil well was drilled by Rocky Mountain Oil Corporation?

10. Please attach plat showing location of land assigned to Rocky Mountain Oil Corporation under partial assignment of lease and adjacent properties held by you.

11. Did you require that the drilling of the oil well commence prior to June 26, 1953?

12. Did you fix the location of the well?

13. Did you require the well to be drilled to a certain depth?

14. (a) Was there a time limit with which the well was to be drilled?

(b) What was that?

15. (a) Did you grant extensions of time for completion of drilling the well to Rocky Mountain Oil Corporation?

(b) If so, how many?

(c) When were they given?

16. (a) Please state the names of your officials, employees or representatives on the premises at the oil well during the drilling operation by Rocky Mountain Oil Corporation.

(b) State their duties and how long they remained upon the premises.

(c) Did your geologist take daily samples during the drilling by Rocky Mountain Oil Corporation?

17. Was this well drilled in order to give you a test for the adjacent properties held by you?

18. Does Rocky Mountain Oil Corporation owe you for rentals paid by you on their behalf on lands covered by U. S. Oil & Gas Lease Idaho 045?

19. Was Rocky Mountain Oil Corporation required to make tests on the well and satisfactory to you upon your request?

20. Were you, under your Agreement with Rocky Mountain Oil Corporation, to have full access to the well and records concerning the drilling of the well?

21. Was a requirement of yours that in the event oil or gas showed during the drilling by Rocky Mountain Oil Corporation they were to cease drilling?

22. Was it your requirement and agreement with Rocky Mountain Oil Corporation that your representatives were to be present at the testing of the well?

23. Was Rocky Mountain Oil Corporation to furnish you drill cuttings at 10-foot intervals from 2500 feet on?

24. Was Rocky Mountain Oil Corporation to furnish you with all drilling information samples

and a day-to-day daily drilling report during the drilling of the well?

25. Was Rocky Mountain Oil Corporation required to furnish you with a certified copy of the complete log upon the completion of the well?

26. Was it not a requirement that prior to the plugging of the well and after its completion, a representative of yours was to determine if the proper depth was reached?

27. Did you have a right to request steel line measurements to be made in the presence of your representatives, said steel line measurement to be made by Rocky Mountain Oil Corporation?

28. Was Rocky Mountain Oil Corporation to furnish you with a Schlumberger Log?

29. Was it not an agreement that the well could not be plugged until 24 hours after the delivery of the Schlumberger Log to you?

30. Was not Rocky Mountain Oil Corporation to make tests of showings if you so requested?

31. Was it not the agreement between you and Rocky Mountain Oil Corporation that there were to be no liens permitted upon the well or premises which would jeopardize your over-riding royalty?

32. Was it not a further agreement that there could be no abandonment of the oil well without 15 days' notice to you?

33. Was not Shell Oil Company to have the right to make tests at its own expense within the 15-day period prior to an abandonment?

34. Could not Shell Oil elect to take over the well and have the premises reassigned to it free and clear of all encumbrances in the event of an abandonment?

35. What was the agreement in the event that Shell Oil Company should take over the well with respect to reimbursing Rocky Mountain Oil Corporation for salvage value and other costs?

36. Please state to what extent you would share in the losses of the venture in the event oil was not obtained.

37. How much per foot were you to pay toward the cost of the well in the event of a dry hole?

38. What consideration was to be paid to Rocky Mountain Oil Corporation by you in the way of assignment of acreage for drilling this well?

39. Who was to pay the rentals on this acreage?

(a) Did you pay rentals on this?

(b) Does Rocky Mountain Oil Corporation owe you now for the rentals?

40. Please state to what extent Shell Oil Company would participate in the profits in the event the drilling turned out to be a producing well.

41. Was not Shell Oil Company frequently consulted in connection with the drilling of this oil well?

42. If the well were a producer, then was Rocky Mountain Oil Corporation required to drill three more wells within not more than three months' time interval between the drilling of wells?

43. Was it not true that the Lease Agreement or any of the production of the well could not be assigned first without the consent of Shell Oil Company?

44. Were you not entitled to take all the production of the well should you so desire?

45. Was it not the agreement that the lease under which Rocky Mountain Oil Corporation operated could not be surrendered without first offering it to Shell Oil Company?

46. Was it not a requirement that in the event an assignment was made by Rocky Mountain Oil Corporation it was to be subject to the agreement between Rocky Mountain Oil Corporation and Shell Oil Company?

47. Was it not the agreement that in any event an assignment could not be made for financing by Rocky Mountain Oil Corporation until the well was completely drilled?

48. Were not the operations being carried out on June 2, 1954, at the well site pursuant to your agreements previously made with Rocky Mountain Oil Corporation?

49. On June 2, 1954, did you not have other agreements and arrangements with Rocky Moun-

tain Oil Corporation for the drilling of wells in Wyoming, Utah and other states?

50. Did you subsequent to June 2, 1954, pay the dry hole money provided for in the Contract in connection with the drilling of this well?

Dated this 12th day of September, 1955.

GLENN A. COUGHLAN,
Attorney for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 12, 1955.

[Title of District Court and Cause.]

No. 1876

ANSWER TO INTERROGATORIES BY DEFENDANT ROCKY MOUNTAIN OIL CORPORATION

To Glenn A. Coughlan, Attorney for the Plaintiff:

The following are answers of the defendant Rocky Mountain Oil Corporation to the Interrogatories numbers 1 through 15, directed to the defendant Rocky Mountain Oil Corporation to be answered pursuant to Rule 33:

Answer to Interrogatory No. 1:

The lease as to Lot 2, Section 30, Township 12 South, Range 46 East, was in the name of Rocky

Mountain Oil Corporation; the other leases were in the name of Shell Oil Company.

Answer to Interrogatory No. 2:

The agreement is set out in the instruments attached pursuant to Interrogatory numbered 5.

Answer to Interrogatory No. 3:

Those things proveded for in the contract attached pursuant to Interrogatory numbered 5.

Answer to Interrogatory No. 4:

The money provided for in the contract, being dry hole money at the rate of $1.50 per foot for the first 3,500 feet and $2.00 per foot for the next 1,500 feet, not to exceed $8,250.00 in any case.

Answer to Interrogatory No. 5:

Attached are copies of an Agreement dated December 26, 1952, between Wheeler and Gray and Shell Oil Company; an Assignment wherein Wheeler and Gray assigned their interest to Rocky Mountain Oil Corporation; and a Consent whereby Shell Oil Company consented to such Assignment.

Answer to Interrogatory No. 6:

A geologist from the office of Shell Oil Company was present part of the time. I have no knowledge of any other supervisors, officials or employees of Shell Oil Company being present.

Answer to Interrogatory No. 7:

As far as I know, said geologist was present to observe.

Answer to Interrogatory No. 8:

Extensions of time for commencement were obtained from them. During drilling they were informed with respect to the drilling progress and formations encountered.

Answer to Interrogatory No. 9:

No. Rental payments were handled in accordance with the contract. Most of the rentals were paid by Shell Oil Company and a charge made against Rocky Mountain Oil Corporation for its pro-rata share. Rocky Mountain had paid the last rental upon the land where the well was drilled.

Answer to Interrogatory No. 10:

Reports were made substantially in accordance with the contract for the purpose of keeping Shell Oil Company informed.

Answer to Interrogatory No. 11:

The contract gave them that right, as I understood the contract, with respect to producing horizons. We were not to earn our acreage until we had drilled the well in accordance with the requirements of the contract, and this was one of the conditions precedent to the earning of such acreage.

Answer to Interrogatory No. 12:

The contract will speak for itself. However, I interpret it to call for consent in case of an assignment of the Agreement itself, but after the earning of acreage and the receipt of assignments therefor, no consent is required to effect a transfer, in my opinion.

Answer to Interrogatory No. 13:

Only to the extent of the dry hole money provided for in the contract and referred to in the Answer to Interrogatory numbered 4.

Answer to Interrogatory No. 14:

The contract speaks for itself. Shell Oil Company was retaining a certain sliding scale overriding royalty in the Lot drilled upon and in an additional 120 acres. They had no other participation in the profits, but they did have additional acreage which could be proved or disproved by the well.

Answer to Interrogatory No. 15:

Yes. We paid the rental and renewed the lease on Lot 2 of Section 30. The rest was handled as provided for in the contract.

Duly verified.

(Copy)

Assignment

Whereas, Wheeler and Gray, a partnership consisting of Bert Wheeler and Lloyd Gray, have entered into a certain agreement dated December 26, 1952, with Shell Oil Company, a Delaware corporation, under which said partnership agreed to drill or cause to be drilled a test well for oil and gas upon Lot 2 of Section 30, Township 12 South, Range 46 East, Boise Meridian, Idaho, in consideration for which Shell Oil Company agreed to assign to said partnership certain oil and gas leases covering approximately 2600 acres, said acreage being checkerboarded with Shell Oil Company and being on what is considered to be the Give Out Structure, in Township 12 South, Ranges 45 and 46 East, Bear Creek County, Idaho, subject to an outstanding overriding royalty of one-half of 1 percent held by Ragner Barhaugh of Casper, Wyoming, and an additional sliding scale overriding royalty to be retained by Shell Oil Company upon the 160 acres where said well is drilled, and also to contribute $8,000.00 towards the cost of said well in the event of a dry hole.

Whereas, said partnership has agreed to assign all rights under said agreement to Rocky Mountain Oil Corporation, a Colorado corporation, and said corporation has agreed to fulfill all obligations under said agreement.

Now, Therefore, for and in consideration of $1.00 and other valuable considerations, receipt of which

is hereby acknowledged, the aforesaid partnership does hereby sell, assign, transfer and convey unto said Rocky Mountain Oil Corporation, all rights and all of its title and interest in, to and under the aforesaid agreement, and assignee by accepting this assignment hereby agrees to be bound by said agreement, to perform all of the covenants therein contained and to fulfill all of the drilling requirements and other obligations of said agreement, in accordance with the provisions of such agreement.

In Witness Whereof, this instrument is executed in duplicate this 6th day of March, 1953.

WHEELER AND GRAY,

By BERT WHEELER,

By LLOYD GRAY.

Accepted and Agreed:

ROCKY MOUNTAIN OIL CORPORATION.

By LLOYD G. GRAY,
Vice-President;

By JOHN J. McINTYRE,
Secretary.

Duly verified.

(Copy)

Consent

Pursuant to Section 10 of that certain Agreement dated December 26, 1952, by and between Shell Oil

Company, a Delaware corporation, and Wheeler and Gray, a partnership consisting of Bert Wheeler and Lloyd G. Gray, Shell hereby consents to the attached assignment dated March 6, 1953, from Wheeler and Gray to Rocky Mountain Oil Corporation, a Colorado corporation, which expressly assumed all the duties and obligations of Wheeler and Gray as set forth in said agreement. This consent, however, shall not operate or be construed as a waiver with respect to any other or subsequent assignments or transfers.

SHELL OIL COMPANY,

By S. F. BOWLBY,
Vice-President;

By .....,
Assistant Secretary.

Duly verified.

[Endorsed]: Filed September 21, 1955.

[Title of District Court and Cause.]

No. 1876-E—Civil

MINUTES OF THE COURT

OCTOBER 5, 1955

This cause came on for trial before the Court and a jury. Glenn A. Coughlan appearing for plaintiff, and Claude Marcus and Gus Carr Anderson for Shell Oil Company, and J. J. McIntyre for the Rocky Mountain Oil Corporation.

The Clerk, under directions of the Court, proceeded to draw from the jury box the names of twelve persons, one at a time, written on separate slips of paper, to secure a jury. Charles E. Cope, whose name was so drawn, was excused on plaintiff's peremptory challenge; Mrs. Esther Bischoff, Mrs. Kate Rainey, Mrs. Owen Benzon and Mrs. Irene Reed, whose names were likewise drawn, were excused on the defendants' peremptory challenges.

The following are the names of the persons whose names were drawn from the jury box, who were sworn and examined on voir dire, found duly qualified and who were accepted by the parties to complete the panel of the jury, to wit:

1. Mrs. Ray L. Haddock
2. Fergus Briggs, Jr.
3. Clarence E. Hensley
4. Millie Mortensen
5. Otto Barthold
6. Hyrum Cooper
7. Elmo Jensen
8. William Jones
9. Marguerita Christensen
10. Louise Farmer
11. L. C. Darrah
12. Vance Bigler

The Court directed that one juror, in addition to the panel, be called to sit as an alternate juror. Thereupon, the name of Jack W. Mays was drawn from the jury box, and on being sworn and ex-

amined on voir dire, was found duly qualified, and was accepted by counsel for the respective parties.

The jury panel and the alternate juror were sworn to well and truly try the cause at issue and a true verdict render.

After a statement of plaintiff's cause by his counsel, Lanus Wayne Prestidge was sworn and examined as a witness in his own behalf and other evidence was introduced.

At this point it was ordered that the deposition of Rufus Doman be published. It was stipulated between counsel that the deposition of Rufus Doman used in case No. 1875 could also be used in this case.

Dr. R. B. Lindsay and J. J. McIntyre were sworn and examined as witnesses on the part of plaintiff.

It is stipulated between counsel that plaintiff's Exhibits Nos. 8 through 13 are true and exact copies of the originals. It is further stipulated that plaintiff's Exhibits No. 7 and No. 12 in case E-1875, William G. Wuthrick vs. Shell Oil Co., et al., may be used as plaintiff's Exhibits Nos. 8 and 15, respectively, in the present case.

Here plaintiff rests.

Comes now Claude Marcus, one of counsel for the Shell Oil Co., and moves the Court to dismiss this action as to the Shell Oil Company. The Motion is denied.

Here defendant Shell Oil Company rests and also defendant Rocky Mountain Oil Corporation rests.

After admonishing the jury, the Court excused them until 10 o'clock a.m. Thursday, October 6, 1955, and further trial of the cause was continued to that time.

[Title of District Court and Cause.]

REQUESTED INSTRUCTIONS BY DEFENDANT, SHELL OIL COMPANY

Now comes Shell Oil Company, one of the defendants in the above cause, and requests the court to give to the jury the following instructions:

Instruction No. 1

You are instructed, ladies and gentlemen of the jury, to find the verdict for the defendant, Shell Oil Company, upon the ground that it has not been proven that the Shell Oil Company was responsible in any way for the injury to the plaintiff in that it has not been shown that the Rocky Mountain Oil Corporation was an agent, servant or employee of the defendant, Shell Oil Company, and that therefore Shell Oil Company is not responsible for such acts of the Rocky Mountain Oil Corporation.

Instruction No. 2

The plaintiff has introduced in this case Exhibit No. . . ., which is called "Designation of Operator." You are instructed that this instrument was filed with the United States Land Department to comply with its regulation 221.19, and is not pertinent to

the issues involved in this case and you are directed to disregard it.

Instruction No. 3

You are instructed that as a matter of law that the evidence in this case does not show that the Rocky Mountain Oil Corporation was acting as the agent, servant or employee of the defendant, Shell Oil Company, at the time of this accident and therefore the Shell Oil Company is not liable in this case and you should not return a verdict in this case against the Shell Oil Company.

Instruction No. 4

You are instructed that should you find the Rocky Mountain Oil Corporation liable in this action but determine that this company was not the agent, servant or employee of the Shell Oil Company at the time of such accident then you should not render a verdict in this case against the Shell Oil Company.

Dated this 6th day of October, 1955.

HAWLEY & MARCUS,
Attorneys for Shell Oil Company;

By /s/ CLAUDE MARCUS.

[Endorsed]: Filed October 6, 1955.

[Title of District Court and Cause.]

No. 1876

VERDICT

We, the jury in the above-entitled cause, find for the Plaintiff, and against the defendants, Shell Oil Company and Rocky Mountain Oil Corporation, and assess damages against the defendants, Shell Oil Company and Rocky Mountain Oil Corporation, in the sum of $19,905.85.

/s/ VANCE BIGLER,
Foreman.

[Endorsed]: Filed October 6, 1955.

[Title of District Court and Cause.]

No. 1876-E—Civil

MINUTES OF THE COURT

OCTOBER 6, 1955

This cause came on for further trial before the Court and jury; counsel for the respective parties being present, it was agreed that the jury panel and the alternate juror were all present.

The cause was argued before the jury by counsel for the respective parties, after which the Court instructed the jury.

The Court discharged the alternate juror, and the jury panel then retired in charge of a bailiff, duly sworn, to consideration of their verdict. While the jury was still out, the Marshal was directed to provide them with lunch at the expense of the United States.

On the same day the jury returned into court, counsel for the respective parties being present, whereupon, the jury presented their written verdict, which was in the words following:

We, the jury in the above-entitled cause, find for the Plaintiff, and against the defendants, Shell Oil Company and Rocky Mountain Oil Corporation, and assess damages against the defendants, Shell Oil Company, and Rocky Mountain Oil Corporation, in the sum of $19,905.85.

/s/ VANCE BIGLER,
Foreman.

The verdict was recorded in the presence of the jury and then read to them and they each confirmed the same.

October 6, 1955.

United States District Court for the District of Idaho, Eastern Division

No. 1876

LANUS WAYNE PRESTIDGE,

Plaintiff,

vs.

SHELL OIL COMPANY, a Corporation; and ROCKY MOUNTAIN OIL CORPORATION, a Corporation,

Defendants.

JUDGMENT

This cause came on for trial before the Court and a jury on October 5, et seq., 1955, both parties appearing by counsel, and the issues having been duly tried and the jury having rendered a verdict for plaintiff in the sum of $19,905.85,

It Is Hereby Ordered, adjudged and decreed that plaintiff recover of defendants, Shell Oil Company and Rocky Mountain Oil Corporation, the sum of $19,905.85, together with interest at the rate of 6% per annum from the 6th day of October, 1955, and his costs of action, and that the plaintiff have execution therefor.

[Seal] ED. M. BRYAN,
Clerk;

By /s/ NEVA ABBEY,
Deputy Clerk.

[Endorsed]: Filed October 6, 1955.

[Title of District Court and Cause.]

NOTICE OF TIME AND PLACE
OF TAXATION OF COSTS
No. 1876

To Hawley & Marcus, Claude Marcus, Attorney for Defendant, Shell Oil Company:

Please take notice that the bill of costs, a copy of which is hereto attached, will be presented to the Clerk of the above Court for taxation at his office in the United States Courthouse at Pocatello, Idaho, on the 13th day of October, 1955, at 2:00 o'clock in the afternoon of that day.

Dated October 10, 1955.

/s/ GLENN A. COUGHLAN,
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Title of District Court and Cause.]

No. 1876

MEMORANDUM OF COSTS AGAINST
SHELL OIL COMPANY

Disbursed by Plaintiff:

Filing Fee	$15.00
Service by U. S. Marshal	2.00
Service by Sheriff of Bear Lake County	1.40
Attorneys Docket Fee	20.00
	$38.40

Witness Fees:

Dr. R. B. Lindsay, Montpelier, Idaho

1 day's attendance	$ 4.00
1 day's subsistence	5.00
200 miles, @ 7c per mile	14.00
	$23.00

Total $61.40

[An identical Memorandum of Costs was presented to Rocky Mountain Oil Co.]

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed October 11, 1955.

[Title of District Court and Cause.]

File No. 1876

MOTION OF SHELL OIL COMPANY FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT, OR FOR NEW TRIAL

Shell Oil Company, defendant above named, moves the court to set aside the verdict of the jury herein, and to set aside the judgment entered herein, and to enter judgment in favor of this defendant in accordance with its motion to dismiss and motion for directed verdict duly made herein, and if the

foregoing motion be denied to set aside the verdict and the judgment herein then to grant this defendant a new trial, said motions being made upon the following grounds and for the following reasons:

(1) That the court should have granted the motion to dismiss made by this defendant and should have granted motion for directed verdict at the close of the dvidence made by this defendant for the reason that the evidence of plaintiff herein was insufficient to constitute a cause of action against this defendant, and was insufficient as a matter of law upon which a verdict and judgment against this defendant could be based.

(2) The error of the court in refusing to grant the motion to dismiss and motion for directed verdict of this defendant.

(3) The error of the court in failing to give the instructions requested by this defendant and especially in failing to instruct the jury as a matter of law with respect to the relationship of the Shell Oil Company and the other defendant above named, and in submitting such question to the jury.

(4) The error of the court instructing the jury with reference to joint enterprise, principal and agent, and master and servant, the evidence being totally insufficient to show any such relationship between the Shell Oil Company and the other defendant in this action.

(5) The error of the court in the admission of evidence, especially that showing performance under

the Wheeler and Gray contract introduced in evidence herein.

(6) The error of the court in refusing to allow evidence that plaintiff in this action was the employee of the other defendant named in this action.

(7) That the verdict of the jury herein is completely contrary to the evidence and the disregard of the jury for the instructions given herein.

(8) That the verdict of the jury herein awarding damages to the plaintiff is grossly excessive and contrary to the evidence.

(9) That the verdict of the jury herein is against the weight of the evidence and grossly excessive.

(10) That the argument of counsel for plaintiff before the jury was improper and prejudicial.

Upon these grounds this defendant moves the court to set aside the verdict of the jury and judgment herein, and to enter judgment in favor of this defendant, or if the foregoing motion be denied to set aside the verdict and judgment, then to grant a new trial herein.

/s/ CLAUDE MARCUS,
Attorney for Shell Oil Company.

Receipt of copy acknowledged.

[Endorsed]: Filed October 11, 1955.

[Title of District Court and Cause.]

No. 1876

ORDER

This matter is before the Court at this time on Defendant Shell Oil Company's Motion to set aside the Judgment and enter Verdict in accordance with its Motion for directed verdict, duly made; and in lieu thereof, a motion for a new trial. Briefs have been filed and the Court has fully considered the same.

The matters alleged as error here, with which the Court is primarily concerned, are those numbered (3) and (4) in the motion, dealing with the failure of the Court to instruct as a matter of law with respect to the relationship of the Shell Oil Company and Rocky Mountain Oil Corporation, and the alleged error of the court in instructing the jury with reference to joint enterprise, principal and agent and master and servant; Shell Oil Company contending that the evidence was totally insufficient to show any such relationship between Shell Oil Company and the other defendant.

At the time of the trial of this case, before the jury, the questions presented by this Motion were presented to the Court on defendant's Motion for Directed Verdict. It was the court's opinion at that time that, rather than prolong the trial by going into an involved study of the points concerned, it should rule without delay, keeping in mind its right to rule

on a motion such as this after due consideration and deliberation. This the Court has now done.

Where facts are in dispute as to what the relation is between parties concerned, that determination must be left to the jury; but where that question is to be determined through contracts and agreements, as in the instant case, the relationship of the parties should ordinarily be found by the court.

The Court is of the opinion that the paper filed with the Bureau of Land Management was not effective to make Rocky Mountain Oil Corporation an agent of Shell Oil Company in all particulars, but was only for the express purposes therein stated.

As to whether a joint adventure existed, we must look to the contracts, the intentions of the parties and all the other attendant circumstances.

> "It is impossible to define the relationship of joint adventure with exactitude and precision. In many respects it is analogous to a partnership, the main difference being that a joint adventure is more limited in its scope of operation than a partnership. In the main, some of the relevant factors of a joint adventure are that there must be joint interest in the property; there must be an agreement, express or implied, to share in the profits and losses from the venture; there must be action and conduct showing co-operation in the property. It has been held that it is not absolutely necessary that there be

participation in both profits and losses. While it is possible to lay down the general characteristics of a joint adventure, in the end, whether a certain transaction constitutes such a relationship can be determined only from a full consideration of all the relevant facts and circumstances in each particular case." Kasishke v. Baker (10th Cir.), 146 F 2d 113 at 115.

Here there was no control over the well drilling by Shell Oil; while interested in the outcome, it was not concerned with the methods or means employed. Certainly it does not appear that either party intended this as a joint venture. There was no participation in profits and losses. The agreement provides that all costs incurred by the drillers, of any nature, were to be borne by them. In case of a dry hole they were to be paid a definite sum per foot of depth of the hole. In case the well was a success there was a provision for a royalty fee. After due consideration, the Court feels that under the contracts, agreements and assignments involved herein, and the somewhat lengthy and, in some respects, detailed provisions thereof, the relationship was one of independent contractor.

For these reasons the Court feels, without going into the other matters alleged as error, that it should grant the Motion of Shell Oil Company for Judgment in accordance with the Motion for a Directed Verdict, and

It is so Ordered.

Dated this 8th day of March, 1956.

/s/ CHASE A. CLARK,
Chief Judge, United States District Court, District of Idaho.

The Judgment will stand as against the Rocky Mountain Oil Corporation.

[Endorsed]: Filed March 9, 1956.

In the United States District Court for the District of Idaho, Eastern Division

No. 1876

LANUS WAYNE PRESTIDGE,

Plaintiff,

vs.

SHELL OIL COMPANY, a Corporation; ROCKY MOUNTAIN OIL CORPORATION, a Corporation, and STONY POINT DEVELOPMENT, INC., a Corporation,

Defendants.

JUDGMENT

This cause came on for trial before the court and jury on October 3rd and 4th, 1955, both parties appearing by counsel. At the conclusion of the trial counsel for defendant Shell Oil Company, a corporation, moved for a directed verdict in behalf of said defendant, which motion the court denied and a verdict was rendered by the jury for plaintiff

against both of the above-named defendants in the amount of $19,905.85. Subsequently, said defendant, Shell Oil Company, a corporation, moved to vacate the judgment in behalf of plaintiff and against this defendant, and have judgment in behalf of said defendant in accordance with its motion for directed verdict. After consideration the court has granted said motion, now, therefore,

It Is Hereby Ordered, Adjudged and Decreed that the judgment heretofore entered in behalf of plaintiff as against Shell Oil Company, a corporation, should be and the same is hereby vacated and set aside.

It Is Further Ordered, Adjudged and Decreed that plaintiff take nothing against defendant Shell Oil Company, a corporation, herein and that said Shell Oil Company have and recover of and from the plaintiff its costs of action in the amount of $36.00, and have execution therefor.

Dated March 23rd, 1956.

/s/ CHASE A. CLARK,
District Judge.

Service of copy acknowledged.
[Endorsed]: Filed March 23, 1956.

[Title of District Court and Cause.]

No. 1876

NOTICE OF TIME AND PLACE OF TAXATION OF COSTS

To: Glenn A. Coughlan, Attorney for Plaintiff Lanus Wayne Prestidge:

Please take notice that the bill of costs, a copy of which is hereto attached, will be presented to the Clerk of the above Court for taxation at his office in the United States Courthouse at Pocatello, Idaho, on the 21st day of March, 1956, at 10:00 o'clock in the morning of that day.

Dated March 16, 1956.

HAWLEY & MARCUS,

By /s/ CLAUDE MARCUS,
Attorneys for Shell Oil Company.

[Title of District Court and Cause.]

No. 1876

MEMORANDUM OF COSTS

Disbursed by defendant, Shell Oil Company, a Corporation:

Attorney's docket fee $20.00

Witness fees:

John J. McIntyre	
1 day's attendance	4.00
1 day's subsistence	5.00
200 miles at $.07 per mile	7.00
John E. Mohr	
1 day's attendance	4.00
1 day's subsistence	5.00
200 miles at $.07 per mile	7.00
Total	$52.00

Costs taxed this 29th day of March, 1956, in the amount of $36.00.

/s/ ED. M. BRYAN,
Clerk.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed March 23, 1956.

[Title of District Court and Cause.]

No. 1876

MOTION FOR NEW TRIAL

Lanus Wayne Prestidge, Plaintiff herein, moves the court for an order setting aside its order of March 8, 1956, and setting aside the Judgment entered herein on March 23, 1956, and granting a partial new trial pursuant to Federal Rules and Procedure 59, or in the alternative, should the court

deem it proper, an entire new trial upon the following grounds:

1. The error of the Court in granting the defendant Shell Oil Company's Motion for directed verdict.

2. The error of the Court in entering judgment for the defendant, Shell Oil Company, contrary to the verdict of the jury.

3. The errors of the Court in finding in its order of March 8, 1956, that:

(a) Rocky Mountain Oil Corporation was an independent contractor of Shell Oil Company.

(b) The question of relationship of the parties was one for the court.

(c) The Designation of Operator and Agent filed by Shell Oil Company was not effective to make Rocky Mountain Oil Corporation an agent of Shell Oil Company.

(d) The relationship of joint adventure or master and servant did not exist.

4. That the Court erred in that:

(a) The findings of March 8, 1956, are against the evidence.

(b) The findings of March 8, 1956, are against the law.

5. Newly discovered and material evidence, discovered since the trial, and which could not have been obtained on the trial by the exercise of reason-

able diligence, as more fully appears from the affidavits of Edmund W. Windolph, Clarence S. Robinson and Glenn A. Coughlan attached hereto and made a part hereof.

Dated this 27th day of March, 1956.

/s/ GLENN A. COUGHLAN,
Attorney for Plaintiff.

[Title of District Court and Cause.]

File No. 1876

AFFIDAVIT OF WITNESS WHO WILL GIVE NEWLY DISCOVERED EVIDENCE

State of Colorado,
County of Denver—ss.

Clarence S. Robinson, being first duly sworn, deposes and says:

That he resides at Loveland, Colorado, and was Drilling Superintendant on an oil well drilling job for Rocky Mountain Oil Company and Shell Oil Company called "Give Out Structure" located approximately 13 miles northwest of Montpelier, Idaho;

That he started rigging up this job in May of 1954;

That he was drilling under the direct supervision of Mr. McIntyre who was the geologist for Shell Oil Company. Mr. McIntyre gave him specific instructions not to start drilling until he, Mr. McIntyre, was there; Mr. McIntyre was to be there all the time. Mr. McIntyre stayed in a motel in

Montpelier, Idaho. Mr. McIntyre gave affiant specific instructions on how to keep up the mud used in the drilling operation and told affiant he should put quebracho and caustic in it; affiant was not to drill unless Mr. McIntyre, the Shell geologist, was there and was to wait on him to get there; Mr. McIntyre, the Shell geologist, had authority to stop the job at any time and did stop him five times; affiant was stopped by Mr. McIntyre also to circulate for samples; affiant was drilling under his direct supervision; Mr. McIntyre took daily samples two or three times a day; he made the "sample catcher," one of the employees, catch him some two foot samples several times.

Affiant went to Mr. McIntyre's quarters in Montpelier one night and advised him of the drilling situation whereupon Mr. McIntyre stopped affiant from drilling and told affiant to circulate and take two-minute samples; Mr. McIntyre had complete control of the operation and was a direct supervisor of affiant's as to anything that had to do with the drilling of the hole; he told affiant when to start and when to stop; affiant looked to Mr. McIntyre for direct instructions and even before affiant started drilling affiant called Mr. McIntyre and advised that he was ready to start operations and Mr. McIntyre told affiant to wait until he got there and that he would start with the job right then;

Affiant was instructed by Mr. Ed Windolph, the General Superintendant of the oil well drilling operation, that he was to take orders from the Shell

Oil Company geologist, Mr. McIntyre, and to follow his instructions in regard to anything that had to do with the drilling of the hole;

That affiant did not communicate the facts aforesaid before the trial and until after the trial because affiant left the State of Idaho on or about July 13, 1954, and went into Colorado and later to Nebraska and back to Colorado and has been in those states since; affiant did not consider it his place to discuss the matter.

Dated this 24th day of March, 1956.

/s/ CLARENCE S. ROBINSON.

State of Colorado,
County of Denver—ss.

Sworn to and subscribed to before me this 24th day of March, 1956.

[Seal] /s/ MARION C. DARLING,
Notary Public.

My Commission expires January 19, 1960.

[Title of District Court and Cause.]

File No. 1876

AFFIDAVIT OF WITNESS WHO WILL GIVE NEWLY DISCOVERED EVIDENCE

State of Colorado,
County of Denver—ss.

I, Edmund W. Windolph, being first duly sworn, depose and say:

That I reside at Brush, Colorado, and was employed by Rocky Mountain Oil Corporation as general superintendent over the entire drilling operation called "Give Out Structure" located about 13 miles northwest of Montpelier, Idaho;

That this job was started in the month of May, 1954, and I received instructions pertaining this drilling operation from the geologist of Shell Oil Company, Mr. McIntyre; I was advised that we were to drill the hole under the supervision of the Shell Oil Company geologist and that he was to be on the job before we commenced drilling operations; I instructed Clarence Robinson, the drilling superintendent, to follow the orders of the Shell Oil Company geologist and told Mr. Robinson that if the geologist told him to shut down he should do so and that Mr. McIntyre was his direct supervisor as to anything that had to do with the drilling of the hole; it was our understanding that we were not to drill a foot of the hole without Shell Oil Company being represented; the geologist of Shell Oil Company, Mr. McIntyre, had complete supervision and we were not to drill a single inch without their representative being there; I called Mr. Gamble, the head man for Shell Oil Company at Grand Junction, Colorado, and he was to call the geologist and we were to wait until the geologist was on the premises before we started drilling; I was given to understand that we were to abide fully by Shell Oil Company's wishes in the drilling of the well by my superior Mr. John McIntyre; if the well drill-

ing operations were shut down for any reason on account of Shell's orders it was all right but if for any other reason then it was under my direct supervision and I was responsible for it; I gave orders to the crew that they were to follow the orders of the geologist; at any time we lost circulation, if Mr. McIntyre, the geologist, was not present, we always sent someone in after Mr. McIntyre so that he could be present after we regained circulation and were ready to drill.

That the deponent did not communicate the facts aforesaid to the plaintiff before trial and until after trial in this action for the reason that affiant left Idaho after July 12, 1954, and was in Colorado thereafter and specifically did not reveal any of the above facts upon the advice of his counsel prior to trial even though he was interviewed at one time by the plaintiff prior to the action and before the trial was started.

/s/ EDMUND W. WINDOLPH.

Sworn to and subscribed to before me this 24th day of March, 1956.

[Seal] /s/ MARION C. DARLING,
Notary Public.

My Commission expires January 19, 1960.

[Title of District Court and Cause.]

AFFIDAVIT

State of Idaho,
County of Ada—ss.

Glenn A. Coughlan, being first duly sworn, deposes and says:

That this action was tried on the 5th and 6th days of October, 1955, before the Court and jury and a verdict was rendered in favor of the plaintiff and against the defendants for the sum of $19,905.85 damages and costs, and Judgment was thereupon entered on the 6th day of October, 1955.

The defendant Shell Oil Company made Motion for Directed Verdict in the above matter prior to the submission of the cause to the jury, and subsequent to jury verdict and judgment thereon made a Motion for Judgment in Accordance With Motion for Directed Verdict or for New Trial, and the Court by Order of March 8, 1956, granted the Motion of the defendant Shell Oil Company for Directed Verdict and Judgment thereon was entered on March 23, 1956.

That since the trial of the action deponent has discovered certain new evidence.

The newly discovered evidence consists of testimony of Edmund W. Windolph, General Superintendent of the oil well drilling operation, showing that the defendant Shell Oil Company was in con-

trol and exercised control of the oil well drilling operation, and that said general Superintendent was subject to their orders and so instructed his men; and said newly discovered evidence further consists of testimony of Clarence S. Robinson, the drilling boss, that he was under the direct supervision and subject to the orders of the Shell Oil Company's geologist who was on the premises at all times and who gave orders and controlled the entire operation, all as more fully appears by the affidavits of said witnesses attached hereto and made a part hereof.

Deponent had no knowledge of the existence of the newly discovered evidence at the time of trial of the cause and had used due diligence to obtain all testimony necessary to support the issue on his part.

That the witness Edmund W. Windolph was interviewed prior to the trial and declined to give the facts at that time because he was advised by his counsel not to do so for which reason the deponent was unable to learn facts of which the witness said Edmund W. Windolph had in his possession.

That deponent was unable to obtain the testimony of the witness Clarence S. Robinson for the reason that the said Clarence S. Robinson left the state immediately after the oil well job was finished on or about the 13th day of July, 1954, and went to Colorado and then to Nebraska before deponent was consulted in the matter; that because of the unavailability of the said Clarence S. Robinson and the

lack of funds of the plaintiff to make extensive investigation without the State of Idaho, he was unable to obtain the testimony of Clarence S. Robinson until after the trial of the action herein wherein the said witnesses voluntarily came forward and gave the facts as contained in the affidavits herein.

That because of the above, the plaintiff was unable to produce any witness to the facts aforesaid on the former trial; that diligent search within his means and inquiry for witnesses and evidence to prove the facts was made, but plaintiff could find or learn of no one by whom said facts could be proven.

The newly discovered evidence has a material bearing on the issues involved in this cause because it shows complete control and co-operation in the operation of the oil well drilling operation by the defendant Shell Oil Company and establishes its liability without question.

/s/ GLENN A. COUGHLAN.

Subsecribed and Sworn to before me this 27th day of March, 1956.

/s/ FERNE WITT,
Notary Public for Idaho.

Receipt of copy acknowledged.

[Endorsed]: Filed March 27, 1956.

[Title of District Court and Cause.]

No. 1876

SUPPLEMENTAL MOTION
FOR NEW TRIAL

Comes now the Plaintiff and makes this explanatory supplement to the Motion for New Trial heretofore filed;

Plaintiff hereby limits the Motion for New Trial to the Defendant Shell Oil Company only, the judgment against Defendant Rocky Mountain Oil Corporation having become final.

Dated: April 2, 1956.

/s/ GLENN A. COUGHLAN,
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed April 2, 1956.

[Title of District Court and Cause.]

No. 1876-E., Civil

MINUTES OF THE COURT

April 6, 1956

This cause came on for hearing on plaintiff's motion for a new trial as to the defendant Shell Oil Company, Glenn A. Coughlan appearing for the plaintiff and Claude Marcus appearing for the defendant.

After hearing argument of counsel, the motion was, by the Court, taken under advisement and plaintiff was given five days to file opening brief and defendant the five days following to answer.

In the District Court of the United States, in and for the District of Idaho, Eastern Division

Nos. 1875 and 1876

WILLIAM G. WUTHRICK,

Plaintiff,

vs.

SHELL OIL COMPANY, a Corporation; ROCKY MOUNTAIN OIL CORPORATION, a Corporation, and STONY POINT DEVELOPMENT, INC., a Corporation,

Defendants.

LANUS WAYNE PRESTIDGE,

Plaintiff,

vs.

SHELL OIL COMPANY, a Corporation; ROCKY MOUNTAIN OIL CORPORATION, a Corporation, and STONY POINT DEVELOPMENT, INC., a Corporation,

Defendants.

MOTION FOR EXTENSION OF TIME AND PERMISSION TO FILE COUNTER AFFIDAVITS

The defendant, Shell Oil Company, respectfully moves the court for extension of time to and in-

cluding the 15th day of April, 1956, in which to file affidavits in opposition to the motion for new trial made herein by plaintiff.

Copies of the affidavits proposed to be filed herein are attached hereto and this motion is made and based upon the same and upon the files and proceedings herein.

HAWLEY & MARCUS,

By /s/ CLAUDE MARCUS,
Attorneys for Shell Oil Company.

[Title of District Court and Causes.]

Nos. 1875 and 1876

AFFIDAVIT OF LOREN B McINTYRE

State of Utah,
County of Salt Lake—ss.

Loren B. McIntyre, first being duly sworn, deposes and says:

That he is a resident of Grand Junction, Colorado, and is employed as a geologist for the Shell Oil Company, a corporation, one of the defendants in this action;

That he has examined in detail the affidavits submitted by the plaintiffs in this action, and more particularly the affidavits of Clarence S. Robinson and Edmund W. Windolph;

That he arrived at the drilling site which was being drilled by Rocky Mountain Oil Corporation at the "Give Out Structure" located approximately 13 miles northwest of Montpelier, Idaho, on the evening of June 1, 1954;

That he went to the well site that evening but upon ascertaining that no one was present at the site he returned to Montpelier, Idaho, and did not return to the well site until June 2, 1954, at approximately 6:00 a.m.;

That he had previously talked to Mr. Edmund W. Windoph by telephone from Grand Junction, Colorado, on or about May 30, 1954, and that said Edmund W. Windolph had informed him that they had started to drill and that the rig had temporarily broken down and would possibly not be repaired for another few days, and that he informed Mr. Windolph that he would be at the well site on June 1st or 2nd to collect geological data for the Shell Oil Company;

That he arrived at the well drilling site on the morning of June 2, 1954, and that he was present at the time plaintiffs to this action were injured and that he was standing near the fire as a spectator waiting for Mr. Robinson who was still asleep in a truck owned by the Rocky Mountain Oil Corporation;

That he is employed as a geologist for the Shell Oil Company and that his sole duties are to collect geological data for the Shell Oil Company, con-

sisting of collecting samples or cuttings from the well, checking cores, reporting drilling data such as depth of the well, location of various geological structures, and the depth in which certain geological formations were found in the ground being drilled, and that this was his sole duty in connection with the drilling of the well, and that affiant had no control whatsoever over any of the drilling operations, that he did not direct or supervise in any manner the employees of the Rocky Mountain Oil Corporation who were in charge of the drilling project and that he did not have any authority and did not exercise or attempt to exercise in any way any supervision or control over any personnel on the drilling site:

That the affidavit submitted by Mr. Robinson is a complete mis-statement of fact with regard to the allegations that affiant gave Mr. Robinson specific instructions not to start drilling until affiant was present and that affiant gave specific instructions or any instructions on the manner in which the mud should be used in the drilling operations or that quebracho and caustic should be added to the drilling mud and that affiant told Mr. Robinson that no drilling should be conducted unless he was present, or that he had any authority to stop the job at any time, and affiant specifically denies all of the above allegations and further denies that he stopped the drilling at any time;

That while the well drilling equipment was in operation that he did procure daily samples of

cuttings from "sample catchers" to check geological formations but that these samples were to 5 foot and 10 foot samples and not 2 foot samples as alleged by Clarence Robinson;

That at the 1,540 foot level on June 9, 1954, sample cuttings indicated possible oil bearing strata and that at this level Mr. Robinson and Mr. Windolph circulated the strata so that cuttings could be obtained to determine whether this area was a possible oil bearing strata, and that the circulation of this area was ordered by Mr. Windolph and Mr. Robinson in accordance with good oil drilling practice and not through any direction of affiant;

That the affidavits submitted by Mr. Robinson and Mr. Windolph are incorrect statements of fact in connection with the allegation of the affiant's control over the operation and affiant specifically denies that he was a direct supervisor of Mr. Robinson or Mr. Windolph and he specifically denies that he told Mr. Robinson or Mr. Windolph when to start drilling operations and when to stop or that he has requested the drilling to be stopped or that he has requested them not to resume drilling until he was on the job;

That affiant did advise Mr. Robinson and Mr. Windolph on several occasions when well drilling equipment had broken down to advise affiant when drilling operations resumed so that he would not have to remain at the well site when no geological information could be obtained;

That on two occasions affiant was advised following a breakdown that drilling had resumed, but on most occasions it was necessary for him to go to the well site to determine whether drilling was in progress and that during the time drilling was in progress affiant collected samples for examination and that he spent only one to two hours at the drilling site each day that drilling was in progress;

That in one area where lost circulation had occurred affiant asked Mr. Windolph if he could core a section of the well for examination, and Mr. Windolph advised affiant that this could be done, but Mr. Robinson stated that they could not cut a core because they had lost circulation material in the mud and this material would plug up the core barrel;

That affiant was on the drilling site from June 2, 1954, to approximately July 14, 1954, at which time the well had been drilled to a depth of 3,300 feet and that at no time during this drilling was any core taken or requested other than the request shown in the preceding paragraph, and that on the 14th after Rocky Mountain Oil Corporation stopped the drilling process due to liens being placed on their equipment, affiant left the drilling site and returned to Grand Junction, Colorado;

That the affidavits of both Mr. Robinson and Mr. Windolph are a complete mis-statement of fact in connection with any of the statements on the exercise of control, as to affiant's supervision of the job or that affiant had any authority or exercised

ny control over the drilling operations or the ersonnel connected with the drilling of this well, nd affiant further states that the complete super- ision and control of the project was in Mr. Win- olph and Mr. Robinson as employees of the Rocky Iountain Oil Corporation and that affiant was the nly employee of Shell Oil Company who was on his job and that affiant at no time exercised or ttempted to exercise in any manner, any control or irection over the operation or the manner of opera- ion of the drilling which was being conducted by Rocky Mountain Oil Corporation and that affiant's ole duty was to collect samples for geological in- ormation and that this was his sole duty in con- ection with the operation of this well.

Dated this 12th day of April, 1956.

/s/ LOREN B. McINTYRE.

State of Utah,
County of Salt Lake—ss.

Sworn to and subscribed to before me this 12th ay of April, 1956.

[Seal] /s/ ANNIE OSBORNE,
Notary Public.

My Commission expires 9-3-57.

[Title of District Court and Causes.]

Nos. 1875 and 1876

AFFIDAVIT IN OPPOSITION TO MOTION FOR NEW TRIAL

State of Idaho,
County of Ada—ss.

Claude Marcus, being first duly sworn, deposes and says:

That he is attorney for the Shell Oil Company in the above-entitled action; that he makes this affidavit in opposition to the motion for new trial made herein by plaintiff.

That affiant was and has been unable to locate Loren B. McIntyre geologist for Shell Oil Company named in the affidavits filed in support of the motion for new trial until recently; that the affidavit of said McIntyre has been obtained and is attached to the motion herein.

That attached hereto are statements made on the dates shown therein by Clarence S. Robinson and Ed Windolph, affiants who purportedly executed the affidavits attached to the motion of plaintiff for new trial herein.

That it is respectfully requested that Shell Oil Company be allowed to file and submit this affidavit and the affidavit of the said Loren B. McIntyre, submitted herewith.

/s/ CLAUDE MARCUS.

Subscribed and Sworn to before me this 13th day of April, 1956.

[Seal] /s/ CATHERINE L. HALL,
Notary Public for Idaho.

3-3-55.

I am Clarence Robinson, age 42, Trans-O-Tel, Brush, Colorado. My address will be General delivery, Brush, Colo., for the forseeable future. I can always be reached 12850 E. Colfax, Trailer Haven, Aurora, Colo., c/o D. L. McDaniel. On 6-2-54, I was working as a Tool-Busher on a drilling job for the Rocky Mountain Oil Co. I was employed by E. W. Windolph of that company and worked for them on this job only. This was a Wildcat operation and we had been at this location for about 2 weeks. Wuthrick and Prestidge had stopped me in town, Montpelier, on about June 1, 1954, and asked me for work on the rig. I told them there were no openings at all and told them there would be none. I made it very clear to them that there was no work for them on our rig and other employees had also told them that we had no work. I worked all night that night and went to sleep in a pickup on the job and told Pop McDaniel not to wake me. This was about 6 a.m. About 7 a.m. Wuthrick and Prestidge came out to the location. There were signs prohibiting trespassing at the gate to the field and also at the rig and they passed both of these signs when crossing to the rig. This rig was 18

miles from town, Montpelier, and they had driven out in an old car. I was asleep when they came out and knew nothing of their presence at the rig until I was awakened and told about the fire. I had Doleman take them to the hospital.

I do not know what Shell Oil had to do with this job but I think they had farmed this well out to the Rocky Mountain Oil Co. Shell Oil's geologist, McIntyre, was at the site about ¼ of the time getting geological data. He was not supervising or doing any work for us at all. His only job was collecting geological data for Shell and that is all he did. Windolph owns the Stoney Point Development Co., but it was not involved in the well we were drilling. He was working for the Rocky Mtn. Oil Co. when we were drilling and as far as I know, he was on salary just like the rest of us. Pop McDaniel, Rufus Doleman, and I were the only employees of Rocky Mountain Oil Co. who present when the accident happened and the only two other persons present were the men who got burned. Windolph arrived at the location right after the fire.

I have read the above 1⅔ pages and they are true to the best of my knowledge.

CLARENCE ROBINSON.

Writing Ryman.

Feb. 11, 1955.

I am Mr. E. W. (Edmond) Windolph of 335 Empire Bldg., Denver, Colo., and 112 Edison, Brush, Colo., Muns Addition. I am President of Stoney Point Development Co. but I do now act as an officer for Rocky Mountain.

I had agreed to supervise drilling an oil well for Rocky Mountain on an expense and wage basis in consideration for Mr. McIntire setting the Crown Uranium Company. Rocky Mt. had the oil site on a farm-out basis from Shell Oil Co. I had no interest whatsoever in the oil well or oil site. It was strictly a wage expense deal.

On approx. June 1st I had come into Montpelier, Idaho., from the rig at approx. 9 *m.m.* There were 2 boys waiting at the hotel to see me about getting a job. I told them they would have to see Clarence Robinson, driller and tool pusher, when he came into town from the rig. I told them not to go out to the rig to see him. The next morning I started out for the drilling site and I had gotten approx. ½ mile from the site when I saw a small unusual column of smoke. I got closer and saw the men running around. When I arrived at the scene there was McIntyre, geologist for Shell, Clarence Robinson, Pop McDaniels and another man who I cannot recall, but whose name would be on the wage sheet at Casper. Clarence Robinson is presently at Traveltel Motel, Brush, Colo., as is Pop McDaniels and the other man is from Montpelier, Idaho, where he runs a welding shop (father works on a railroad).

The above three were employed by Rocky Mountain. There were two other men there who had been burned. I asked what happened and McIntyre said the two had been burned and they had had a very difficult time catching them as they had run all over. McIntyre said the unnamed person above was going to put some oil on the fire and had stated "Get back boys I am going to put some oil on the fire." McIntyre said he moved back but the other two men didn't move back. The unknown person apparently tripped and the fire resulted. The burned men were the same two I had talked to the night before and I don't know whether they had been successful in contacting Clarence that night. I asked Clarence what had happened and he told me the two men had asked him for a job and he told them no and to stay away from the rig. However, it was cold, so instead of leaving, they sat around the fire. It was extremely cold and it was necessary to have a fire every day.

Two "No trespassing" signs had been posted, one at the gate and one at the rig because it was a tide hole and didn't want to let anyone have any information about it. Although there was supposed to be liability insurance on the rig, it wasn't in force at the time. Rocky Mountain did have Workman's Compensation coverage in Idaho at the time. I don't know whether Rocky Mountain was set up to do business in Idaho or not, but I know Stoney Point definitely does not.

Shell's employee, McIntyre, had absolutely no

authority on the job and anything he wanted done he asked me and it was done through me. He was a geologist and had no authority and did not exercise any.

I have read the above 3⅛ pages and it is true to the best of my knowledge.

E. W. WINDOLPH,

Receipt of copy acknowledged.

[Endorsed]: Filed April 13, 1956.

[Title of District Court and Cause.]

Nos. 1875 and 1876

OBJECTION TO MOTION FOR EXTENSION OF TIME IN PERMISSION TO FILE COUNTER AFFIDAVITS

Come Now the plaintiffs in the above-entitled matters and object to defendant Shell Oil Company's Motion for an Extension of Time and Permission to file Counter Affidavits upon the following grounds and for the following reasons:

1. That said Motion is made too late for the reason that Federal Rules of Civil Procedure No. 59(c) provides that opposing affidavits must be filed within ten days of the time the original affidavits and Motion are filed; that the original affidavits in this matter and Motion for new Trial was filed upon the 27th day of March, 1956.

2. That defendant's Motion and affidavits are filed too late for the reason that Federal Rules of Civil Procedure No. 6(d) provides that opposing affidavits must be filed at least one day prior to the hearing of the Motion; that the Motion for New Trial was argued on the 6th day of April, 1956.

3. That the defendant appeared on argument for Motion for New Trial on the 6th day of April, 1956, without filing any Motion or counter affidavits or making any request to the Court at that time for extension of time or assigning any reason for his failure to file counter affidavits at that time.

4. That the defendant has assigned no reasonable excuse for the failure to file affidavits except flimsy statement that he has been unable to locate the Shell Geologist; and he makes no statement of diligence as to what action was taken to locate Mr. McIntyre though he is as appears by his affidavit an employee of the defendant Shell Oil Company and could, of course, be located in a few moment's time merely by contacting the defendant's headquarters in the vicinity.

5. That the defendant has shown a complete disregard for the rules of the court and of the Federal Rules of Civil Procedure in respect to the timely filing of documents by the lack of diligence.

6. That the defendant attempts to inject into the case improper matter purporting to be unsworn statements of Clarence S. Robinson and Ed Win-

dolph, these statements having no standing in this matter whatsoever.

7. This Motion is based upon the records and files of the proceedings herein together with the affidavit of plaintiffs' attorney attached hereto.

Dated this 16th day of April, 1956.

/s/ GLENN A. COUGHLAN,
Attorney for Plaintiffs.

[Title of District Court and Causes.]

Nos. 1875 and 1876

AFFIDAVIT IN OPPOSITION TO MOTION FOR EXTENSION OF TIME AND PERMISSION TO FILE COUNTER AFFIDAVITS

State of Idaho,
County of Ada—ss.

Glenn A. Coughlan, being first duly sworn, deposes and says:

That he is attorney for the plaintiffs in the above-entitled action; that he makes this affidavit in opposition to the Motion for Extension of Time and Permission to File Counter Affidavits by the defendant Shell Oil Company;

That defendant Shell Oil Company failed to file counter affidavits to plaintiffs' Motions for New

Trial and affidavits in support thereof within the time allowed, and appeared on argument for a Motion for New Trial and made no application at that time to file counter affidavits and did not assign any reason for his failure to do so before the Honorable Fred Taylor who heard said Motion and defendant's attorney was advised by the court at said time that he had made no showing and that there was nothing before the court and no showing in the record in opposition to plaintiffs' Motion, and that defendant was now too late to make filing;

That defendant in an obvious attempt to rectify his lack of diligence after learning of the court's attitude attempts to file his affidavit containing the flimsy excuse that he has been unable to locate the employee of the defendant without setting forth that any attempt whatever was made prior to the hearing of the Motion for New Trial or making any showing of what diligence was exercised to obtain the tardy affidavit he now seeks to file; that defendant has exhibited a complete lack of diligence in this matter and is not entitled to have his tardy Motion and affidavits accepted by the court;

That defendant is attempting to inject improper matter into the cases by the filing of alleged purported statements of Clarence S. Robinson and Edmond Windolph which are purely hearsay of the second degree and that the affidavit of the attorney for the defendant is improper in attempting to inject unsworn purported statements of someone else which are not identified or certified in any way;

That defendant's attorney's affidavit assigns no reasonable excuse for the failure to file the affidavits within the time required and said affidavits and statements should be stricken for the reason that they are tardy, sham and frivolous.

/s/ GLENN A. COUGHLAN.

Subscribed and Sworn to before me this 16th day of April, 1956.

[Seal] /s/ C. STANLEY SKILES,
Notary Public for Idaho.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 16, 1956.

[Title of District Court and Causes.]

Nos. 1875 and 1876

MOTION TO STRIKE FROM THE FILES

Come Now the plaintiffs in the above-entitled matters and respectfully move the court to strike from the files in this case the affidavit of Loren B. McIntyre upon the ground that the same is filed too late pursuant to Federal Rules of Procedure Nos. 6(d) and 59(c);

And plaintiffs further move to strike the affidavit of defendant's attorney and statements attached to said affidavit purporting to be statements of Clarence Robinson and Edmond Windolph as not

being proper supporting documents, not being sworn to or being properly identified in order to entitle them to any weight whatsoever, such documents being a patent obvious attempt by the defendant Shell Oil Company to obtain an unreasonable and unfair advantage by injecting material into these cases which are not properly a part thereof.

Dated April 16, 1956.

/s/ GLENN A. COUGHLAN,
Attorney for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed April 16, 1956.

[Title of District Court and Cause.]

No. 1875

ORDER

This matter is before the Court at this time on Defendant Shell Oil Company's Motion for Extension of Time and Permission to File Counter Affidavits to which the Plaintiff objects and has moved to strike the said affidavit. These matters are in relation to the primary matter herein which is Plaintiff's Motion for a New Trial.

The Motion for Extension is hereby granted and the Counter Affidavit filed as part of the record herein.

Briefs have been submitted on the Motion for New Trial and the Court has fully considered the same. The Court is of the opinion that for the reasons stated in the Motion, supported by Affidavits, the Motion for New Trial should be granted.

Now, Therefore, it is hereby Ordered that the Motion be and the same is hereby granted, and that a New Trial in its entirety, as to all questions presented, be and the same is hereby Ordered.

Dated this 26th day of April, 1956.

/s/ CHASE A. CLARK,
Chief Judge, United States District Court, District of Idaho.

[Endorsed]: Filed April 26, 1956.

[Title of District Court and Cause.]

File No. 1876

NOTICE TO TAKE DEPOSITION UPON ORAL EXAMINATION

To Shell Oil Company, a Corporation, and Its Attorney Claude V. Marcus, Eastman Building, Boise, Idaho:

Please Take Notice, That at 2:00 o'clock p.m. on the 19th day of May, 1956, the plaintiff, Lanus Wayne Prestidge, in the above-entitled action, will take the deposition of Doctor R. B. Lindsay who resides at Montpelier, Idaho, at his office in the

First Security Bank Building, Montpelier, Idaho, upon oral examination before an officer authorized by law to take depositions. The oral examination will be taken pursuant to the Federal Rules of Civil Procedure and will continue from day to day until completed. You are invited to attend and cross-examine.

Dated this 12th day of May, 1956.

/s/ GLENN A. COUGHLAN,
Attorney for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 12, 1956.

[Title of District Court and Cause.]

No. 1876

MOTION FOR SUMMARY JUDGMENT

Shell Oil Company, a defendant above named, a corporation, hereby moves the court to enter summary judgment for said defendant and against the above-named plaintiff in accordance with the provisions of Rule 56, of the Rules of Civil Procedure. This motion is made and based upon the affidavits of Clarence Robinson and E. W. Windolph filed in this case in support of the motion for new trial made by the above-named plaintiff which has been granted, and upon the affidavits of Claude Marcus and Loren B. McIntyre, filed in this case in opposi-

tion to said motion for new trial by plaintiff, and upon the affidavits which the defendant is requesting permission to hereinafter file supplementing and supporting this motion for summary judgment, and upon the files and proceedings herein.

The said defendant respectfully asks permission to file such supplemental affidavits at any time prior to May 24th, 1956.

Dated May 14, 1956.

/s/ CLAUDE MARCUS,
Attorney for Shell Oil Company.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 14, 1956.

[Title of District Court and Cause.]

No. 1876

MOTION TO POSTPONE TRIAL OF CASE

Shell Oil Company, defendant above named, moves that the trial date of May 24th, 1956, for the above-entitled case be vacated and that the trial of said case be postponed and reset at some future date at least 10 days later than May 24th, 1956, upon the following grounds and for the following reasons:

(a) That it is not possible for this defendant to properly prepare for said trial by May 24th, 1956.

(b) That a new trial has been granted herein upon the basis of affidavits made by a Clarence Robinson and E. W. Windolph; that this defendant desires sufficient time to take the deposition of each of said witnesses under oath prior to the time of trial and since said witnesses reside out of the State of Idaho and in the State of Colorado, there will be insufficient time to do so prior to May 24th, 1956.

(c) That a Pop McDaniel, an employee who was working at the well drilling job described in this case, is a material and necessary witness for the defendant; that despite diligent inquiry and effort to locate him the defendant has been unable to ascertain the present whereabouts of said witness, but is endeavoring to locate said witness through a brother who resides in the State of Kansas.

(d) That defendant desires to obtain medical examination of the above-named plaintiff prior to trial and needs additional time in which to obtain such examination.

This motion is made and based upon the above allegations, the attached affidavit of Claude Marcus and upon the files and proceedings in this action.

Dated May 14, 1956.

/s/ CLAUDE MARCUS,
Attorney for Shell Oil Company.

[Title of District Court and Cause.]

No. 1876

AFFIDAVIT OF CLAUDE MARCUS

State of Idaho,
County of Ada—ss.

Claude Marcus, being first duly sworn, deposes and says:

That he is attorney for Shell Oil Company in the above-entitled action; that immediately after being advised that the above case was set for trial May 4th, 1956, affiant made a trip to Salt Lake City May 7, 1956, for the purpose of locating witnesses whose testimony will be material on a new trial of this case, especially the testimony of a Pop McDaniel. That affiant endeavored to locate said witness by inquiry from Mr. John McIntyre, President of Rocky Mountain Oil Corporation, one of the above-named defendants, and the last known employer of said Pop McDaniel. That affiant has been unable to ascertain the whereabouts of said witness through inquiry from this and other sources and is now endeavoring to locate the witness through a brother residing in Kansas.

That this defendant considers it advisable and necessary to the defense of this case to obtain physical examination of the above-named plaintiff and to take depositions of other witnesses in said case; that it is impossible for the defendant to obtain such testimony and adequately prepare this case

prior to May 24th, 1956, and for that reason this defendant is respectfully asking a postponement of the trial of this case to a date at least 10 days later.

/s/ CLAUDE MARCUS.

Subscribed and Sworn to before me this 14th day of May, 1956.

[Seal] /s/ CATHERINE L. HALL,
Notary Public for Idaho.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 14, 1956.

[Title of District Court and Cause.]

No. 1876

SUPPLEMENTAL ORDER

It is hereby Ordered that the Order made on the 26th day of April, 1956, granting a New Trial in the above-entitled matter be, and the same is hereby, amended by inserting in the fourth paragraph in the next to the last line of said order, after the word "entirety" and before the word "as" the words "as to the Shell Oil Company."

Dated this 16th day of May, 1956.

/s/ CHASE A. CLARK,
Chief Judge, United States District Court, District of Idaho.

[Endorsed]: Filed May 17, 1956.

[Title of District Court and Cause.]

No. 1876

MOTION IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Comes now the Plaintiff in the above-entitled action and moves that the Court deny the Defendant's Motion for Summary Judgment for the reason that questions of fact are raised by Defendant's own Motion, and in addition, other questions of fact are present, all of which must be decided on new trial in view of the Court's ruling that the matter as against Shell Oil Company shall be tried in its entirety.

This Motion is based upon the affidavits of Clarence Robinson, E. W. Windolph, and Glenn A. Coughlan made in support of Motion for New Trial heretofore filed in this action, and is further based upon all the records, files, and proceedings in this matter.

Dated this 16th day of May, 1956.

/s/ GLENN A. COUGHLAN,
Attorney for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 21, 1956.

[Title of District Court and Cause.]

No. 1876-E-Civil

MINUTES OF THE COURT

May 21, 1956

This cause came on regularly this date in open court on defendant's Motion for a Summary Judgment, Motion to Postpone Trial, and plaintiff's Motion in Opposition to postponing the trial. Glenn A. Coughlan appeared on behalf of plaintiff and Claude Marcus for defendant. Upon Motion of Claude Marcus, Grant C. Aadnesen, Esquire, was admitted to practice at the bar of this court and was entered as associate counsel for defendant.

After hearing counsel for the respective parties, the Motion for Summary Judgment was denied; the Motion to Postpone the Trial was denied, and the Motion in Opposition was granted.

It was stipulated by and between counsel that it would not be necessary to empanel an alternate juror and that if any juror became incapacitated or unable to serve, a verdict of the remaining jurors would be binding.

[Title of District Court and Cause.]

No. 1876

NOTICE OF FILING OF DEPOSITION

To: Claude Marcus, Attorney for Defendant.

Sir: Please Take Notice that the Deposition of Dr. Rulon B. Lindsay, taken before Ray D. Bistline, a certified shorthand reporter and notary public in and for the County of Bannock, State of Idaho, has been duly certified to and returned to the Clerk of the United States District Court for the District of Idaho, and has been filed in the office of the Clerk.

Dated at Pocatello, Idaho, this 23rd day of May, 1956.

/s/ GLENN A. COUGHLAN,
Attorney for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 23, 1956.

[Title of District Court and Cause.]

No. 1876

DEFENDANT'S REQUESTED INSTRUCTIONS

Shell Oil Company, defendant, respectfully requests, if in addition to the usual instructions given

by the court, Instructions Nos. 1 to 9, inclusive, herein contained.

HAWLEY & MARCUS,

By /s/ CLAUDE MARCUS,
Attorneys for Shell Oil Company.

Instruction No. 1

You are instructed that, as a matter of law, the contract between the Rocky Mountain Oil Corporation and Shell Oil Company created an independent contractor relationship and that Shell Oil Company is not liable for the negligence of an employee of Rocky Mountain Oil Corporation and therefore your verdict should be in favor of the defendant and against the plaintiff.

Instruction No. 2

You are instructed that the evidence in this case is insufficient to show liability on the part of defendant Shell Oil Company and therefore you are instructed and advised to return a verdict in this case for the defendant Shell Oil Company and against the plaintiff.

Instruction No. 3

You are instructed that natural persons or corporations have a right to enter into lawful contracts and if such contract creates the relationship of an independent contractor a contracting party is not liable for the negligence of the other party or the

negligence of employees, agents or servants of the other party.

Instruction No. 4

As I have earlier instructed you the contract between the Rocky Mountain Oil Corporation and the Shell Oil Company created the relationship of independent contractor and therefore Shell Oil Company is not responsible for the negligence of the Rocky Mountain Oil Corporation or of its employees. Before you may find against the defendant Shell Oil Company in this case you must find and determine from the evidence that Shell Oil Company had the right by separate agreement with the Rocky Mountain Oil Corporation and actually exercised control and supervision over said oil drilling at the very time that this accident occurred beyond and outside the terms of said contract and even should you find that at such time Shell Oil Company exercised and had the right to exercise control and supervision over such oil well drilling beyond and outside the terms of said contract you may not render a verdict against Shell Oil Company unless you further find that such control was so extensive as to amount to control over the method and means of performing such oil well drilling as well as control over the agencies and personnel employed in the performance of such work.

Instruction No. 5

Should you find that the Shell Oil Company exercised such control and supervision over the oil well

drilling outside and beyond the terms of the contract between Shell Oil Company and Rocky Mountain Oil Corporation as to make the Rocky Mountain Oil Corporation and its employees the servants and employees of Shell Oil Company before you can find a verdict against the defendant Shell Oil Company you must find and determine that such relationship existed between Rufus Doman and the Shell Oil Company at the particular time of the occurrence resulting in injury to the plaintiff and in respect to the very transaction out of which such injuries arose. Before you can find that said Rufus Doman was the servant or employee of the Shell Oil Company at such time you must find that Shell Oil Company had the right to exercise and was exercising control and supervision over said drilling work to the extent that I have outlined in other instructions.

Instruction No. 6

The defendant in this case has interposed the defense of contributory negligence on the part of the plaintiff. You are instructed that in the event you find the plaintiff was guilty of contributory negligence which contributed in any degree to the accident involved herein then your verdict should be for the defendant and against the plaintiff.

Instruction No. 7

Should you find that, at the time of the injury, the plaintiff was an employee of the Rocky Mountain Oil Corporation and that the person whose

negligence, if any, caused this accident was not an employee, agent or servant of the Shell Oil Company then your verdict should be in favor of the defendant and against the plaintiff.

Instruction No. 8

You are instructed as a matter of law that the contract between Shell Oil Company and Rocky Mountain Oil Corporation created an independent contractor relationship and that Shell Oil Company would not be responsible or liable for the negligence of an employee of Rocky Mountain Oil Corporation. In this case unless you find that the Shell Oil Company exercised control over said oil well drilling over and beyond the terms of said contract, your verdict should be for the defendant. Should you find that at such time Shell Oil Company exercised and had the right to exercise control and supervise all of such oil well drilling, over, beyond and exceeding the terms of said contract, you may not render a verdict against the defendant unless you find that such control was so extensive as to amount to control over the method and means of doing such oil well drilling and control over the agents and personnel employed therein and that the defendant was exercising such control and supervision beyond the terms of said contract at the very time that this accident occurred.

Instruction No. 9

You are instructed that Regulation 221.19 of the

U. S. Department of the Interior, Land Office, provides as follows:

In all cases where operations on a lease are not conducted by the record owner, but are to be conducted under authority of an operating agreement, an unapproved assignment, or other arrangement, a "designation of operator" shall be submitted to the supervisor, in a manner and form approved by the supervisor, prior to commencement of operations. If the designation of operator form cannot be obtained from the lessee without undue inconvenience to the operator, the supervisor in his discretion may accept in lieu thereof a valid operating agreement approved by the Secretary. A designation of operator will be accepted as authority of operator or his local representative to fulfill the obligations of the lessee and to sign, as operator, any papers or reports required under these oil and gas operating regulations. It will rest in the discretion of the supervisor to determine how a local representative of the operator empowered to act in whole or in part in his stead shall be identified.

If the designated operator shall at any time be incapacitated for duty or absent from his designated address, the operator or the lessee shall designate in writing a substitute to serve in his stead, and, in the absence of such operator or of notice of the appointment of a substitute, any employee of the lessee who is on the leased lands or the contractor or other person in charge of operations will be considered the agent of the lessee for the service

f orders or notices and service in person or by rdinary mail upon any such employee, contractor, r other person will be deemed service upon the perator and the lessee. All changes of address and ny termination of the operator's authority shall e immediately reported, in writing, to the supervisor or his representative. In case of such termiation or of controversy between the lessee and the esignated operator, the operator, if in possession f the leasehold will be required to protect the interests of the lessor.

You are instructed that the filing of such designation of operator under this Regulation would not onstitute such operator, general agent, for the parties executing such designation, but such designation ould be restricted to the matters therein contained.

[Endorsed]: Filed May 24, 1956.

Title of District Court and Cause.]

No. 1876-E—Civil

MINUTES OF THE COURT

May 24, 1956

This cause came on for trial before the Court and jury. Glenn A. Coughlan, Esquire, appearing for he plaintiff, and Claude Marcus and Grant C. adnesen appearing for the defendant. On motion f Glenn Coughlan, Esq., it was ordered that Milton

Zener, Esq., be entered as associate counsel for the plaintiff.

The Clerk, under direction of the Court, proceeded to draw from the jury box the names of twelve person, one at a time, written on separate slips of paper, to secure a jury. McKinley Jenkins and Harry L. Hops, whose names were so drawn, were excused on plaintiff's peremptory challenges; and Lenore Brownlee, Frank Michael and Mrs. Clyde Gravatt, whose names were also drawn, were excused on defendant's peremptory challenges.

Following are the names of the persons whose names were drawn from the jury box, who were sworn and examined on voir dire, found duly qualified, and who were sworn to well and truly try said cause and a true verdict render, to wit:

1. John R. Williams
2. Rex Howard
3. Ilene Mehlhaff
4. Hugh L. Tuohy
5. Esther Balmforth
6. Cora Noble
7. Fred Deeg
8. Robah Glascock
9. Bud Kelly
10. Keith F. Adams
11. Clifford G. Merrill
12. Robert Barclay

It was stipulated by and between counsel for the respective parties that it would not be necessary to empanel an alternate juror and that if any of the

regular panel of twelve were absent for any reason, a verdict of the remaining jurors serving would be binding.

The jury was admonished by the Court and excused for a short time. During the absence of the jury, the defendant moved the Court for an Order dismissing this cause under Rule 41 of the Federal Rules of Civil Procedure. The motion was denied.

After a statement of plaintiff's cause by one of his counsel, Lanus Wayne Prestidge and Edmond W. Windolph were sworn and testified as witnesses and other evidence was introduced on the part of plaintiff.

Upon motion of Glenn Coughlan, Esq., the deposition of Rufus Doman was ordered published and the same was read into the record by Milton Zener reading the questions on direct examination and Claude Marcus the questions and Glenn Coughlan the answers on cross-examination.

The deposition of Dr. Rulon B. Lindsay was ordered published on motion of Glenn A. Coughlan and the same was read into the record by Milton Zener reading the questions and Glenn A. Coughlan the answers thereto.

After admonishing the jury, the Court excused them to 9:30 a.m., Friday, May 25, 1956, and further trial of the cause was continued to that time.

[Title of District Court and Cause.]

No. 1876

VERDICT

We, the jury in the above-entitled cause, find for the plaintiff, and against the defendant, Shell Oil Company, a corporation, and assess damages against the defendant, Shell Oil Company, a corporation, in the sum of $10,000.

/s/ KEITH F. ADAMS,
Foreman.

[Endorsed]: Filed May 25, 1956.

[Title of District Court and Cause.]

No. 1876-E—Civil

MINUTES OF THE COURT

May 25, 1956

This cause came on for further trial before the Court and jury; counsel for the respective parties being present, it was agreed that the jury panel was present.

Warren McIntyre was sworn and testified as a witness for the plaintiff.

Upon stipulation of counsel, it was Ordered that any Exhibit introduced and received in Cause No.

1875-E may be withdrawn and used in Cause No. 1876-E.

Comes now the plaintiff, in the absence of the jury, and moves the Court for an Order directing the Clerk to enter default against the defendant, Shell Oil Company, on the grounds and for the reason the defendant did not comply with Rules 36 and 37 of the Federal Rules of Civil Procedure. Motion denied.

At this time plaintiff's interrogatories propounded to the defendant and the answers thereto were read into the record by Milton Zener reading the questions and Glenn A. Coughlan the answers thereto.

Here plaintiff rests.

Plaintiff having rested, comes now the defendant, Shell Oil Company, and moved the Court for an Order dismissing this cause of action. The motion was denied by the Court without prejudice.

Here defendant rests and both sides close. Both sides having closed, comes now the defendant, Shell Oil Company, and moves the Court for an Order dismissing this cause. The motion was denied. Thereupon, defendant, Shell Oil Company, moved the Court for a directed verdict in favor of the defendant, Shell Oil Company, and against the plaintiff. The motion was denied.

The cause was argued before the jury by counsel for the respective parties, after which the Court instructed the jury, and placed them in charge of

bailiffs duly sworn, and they retired to consider their verdict. While the jury was still out, the Marshal was directed to provide them with supper at the expense of the United States.

On the same day the jury returned into Court, counsel for the respective parties being present, whereupon the jury presented their written verdict, which was in the words following.

In the United States District Court for the District of Idaho, Eastern Division

No. 1876

LANUS WAYNE PRESTIDGE,

Plaintiff,

vs.

SHELL OIL COMPANY, a Corporation; ROCKY MOUNTAIN OIL CORPORATION, a Corporation, and STONY POINT DEVELOPMENT, INC., a Corporation.

Defendants.

JUDGMENT

This cause came on for trial before the Court and a jury on May 24, 1956, et seq., both parties appearing by counsel, and the issues having been duly tried and the jury having rendered a verdict for plaintiff and against the defendant, Shell Oil Company, a corporation, in the sum of $10,000.00,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff recover of defendant, Shell Oil Com-

pany, a corporation, the sum of $10,000.00, with interest at the rate of 6% per annum, and his costs of action, and that the plaintiff have execution therefor.

Dated this 28th day of May, 1956.

[Seal] /s/ ED M. BRYAN,
Clerk.

[Endorsed]: Filed May 28, 1956.

[Title of District Court and Cause.]

No. 1876

MOTION OF SHELL OIL COMPANY FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT, OR FOR NEW TRIAL

Shell Oil Company, defendant above named, moves the court to set aside the verdict of the jury herein and to set aside the judgment entered herein and to enter judgment in favor of this defendant in accordance with its motion to dismiss and motion for directed verdict duly made herein and if the foregoing motion be denied to set aside the verdict and the judgment herein and to grant defendant a new trial, said motions being made upon the following grounds and for the following reasons:

(a) That the court should have granted the motion to dismiss made by this defendant and

should have granted the motion for directed verdict made by this defendant at the close of the evidence for the reason that the evidence of plaintiff was insufficient to constitute a cause of action against this defendant and was insufficient as a matter of law upon which a verdict for a judgment against this defendant could be based.

(b) The error of the court in refusing to grant the motion to dismiss and motion for directed verdict of this defendant.

(c) Error of the court in failing to give the instructions requested by this court and especially in failing to instruct the jury as a matter of law with respect to the relationship of the Shell Oil Company and the Rocky Mountain Oil Corporation and the error of the court in submitting such questions to the jury.

(d) The error of the court in submitting a form of verdict to the jury with a caption containing the names of parties defendant in addition to that of this defendant.

(e) The error of the court in instructing the jury with reference to joint enterprise, principal and agent, and master and servant, the evidence being totally insufficient to show any such relationship between Shell Oil Company and the other named defendants.

(f) The error of the court in the admission and exclusion of evidence especially in material evidence

offered under the theory of control by Shell Oil Company.

(g) That the verdict of the jury herein is completely contrary to the evidence and that the jury disregarded the instructions given herein.

(h) That the verdict of the jury awarding damages to the plaintiff is grossly excessive and contrary to the evidence.

(i) That the verdict of the jury herein is against the weight of the evidence and excessive.

(j) The error of the court in allowing interrogatories and admissions and answers thereto read in evidence.

Upon these grounds and upon the records, files and proceedings herein this defendant moves the court to set aside the verdict of the jury and judgment herein and to enter judgment in favor of this defendant and if the foregoing motion be denied to set aside the verdict and judgment and then to grant a new trial herein.

These motions are made without prejudice to the disposition and determination of any and all pending motions or matters before this court.

/s/ CLAUDE MARCUS,
Attorney for Shell Oil Company.

Receipt of copy acknowledged.

[Endorsed]: Filed May 31, 1956.

[Title of District Court and Cause.]

No. 1876

NOTICE OF TIME AND PLACE OF TAXATION OF COSTS

To Claude V. Marcus, Attorney for Defendant, Shell Oil Company:

Please take notice that the bill of costs, a copy of which is attached hereto, will be presented to the Clerk of the above court for taxation at his office in the United States Courthouse at Boise, Idaho, on the 7th day of June, 1956, at 10:00 o'clock in the morning of that day.

Dated this 1st day of June, 1956.

/s/ GLENN A. COUGHLAN,
Attorney for Plaintiff.

[Title of District Court and Cause.]

No. 1876

MEMORANDUM OF COSTS

Disbursed by plaintiff, Lanus Wayne Prestidge:

Filing fee	$ 15.00
Service, U. S. Marshal	2.00
Service of subpoenas	1.10
Service by Sheriff of Bear Lake Co.	1.40
Attorneys docket fee	20.00
	$ 39.50

Witness Fees:

Dr. R. B. Lindsay, Montpelier, Ida. (First trial):	
1 day's attendance	4.00
1 day's subsistence	....
200 miles at 7c per mile	14.00
Dr. R. B. Lindsay—Deposition (Second trial)	30.00
Edmond Windolph	
2 days' attendance	8.00
2 days' subsistence	10.00
200 miles at 7c per mile	14.00
Loren McIntyre	
2 days' attendance	8.00
2 days' subsistence	10.00
2 miles at 7c per mile	.14
John Gamble	
2 days' attendance	8.00
2 days' subsistence	10.00
2 miles at 7c per mile	.14
	$121.28
Total	$160.78

Costs taxed this 7th day of June, 1956, in the amount of $137.64.

/s/ ED M. BRYAN,
Clerk.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed June 1, 1956.

[Title of District Court and Cause.]

No. 1876-E—Civil

MINUTES OF THE COURT

July 26, 1956

This cause came on regularly this date in open court for hearing on Defendant's Motion for Judgment in Accordance with Motion for Directed Verdict, or for New Trial—Glenn A. Coughlan, Esquire, appearing as counsel for the Plaintiff; Claude Marcus and Grant C. Aadnesen appearing on behalf of Defendant.

After hearing counsel for the respective parties and being fully informed, the Court denied the Motion for Judgment in Accordance with Motion for Directed Verdict or for New Trial.

[Title of District Court and Cause.]

No. 1876

NOTICE OF APPEAL

Notice Is Hereby Given that Shell Oil Company, a corporation, a defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain final order denying the motion for directed verdict or for new trial of this defendant made and entered in this action on July 26, 1956.

Dated August 23rd, 1956.

/s/ CLAUDE MARCUS,

/s/ BLAINE F. EVANS,

/s/ GRANT C. AADNESEN,
Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed August 23, 1956.

[Title of District Court and Cause.]

No. 1876

UNDERTAKING ON APPEAL

Know All Men by These Presents:

Whereas, Shell Oil Company, a corporation, is appealing to the United States Court of Appeals for the Ninth Circuit from that certain order and judgment denying judgment in accordance with motion for directed verdict or for new trial of the said Shell Oil Company, said order made and entered in the above-entitled action July 26, 1956, and

Whereas, the said appellant desires to give an undertaking on appeal for costs that may be awarded against it on said appeal,

Now Therefore, in consideration of the premises and of such appeal the undersigned, American Automobile Insurance Company, a corporation, duly licensed and authorized to transact business in the

State of Idaho, and authorized to give such undertaking on appeal to become sole surety on undertaking in judicial proceedings does hereby undertake and promise on the part of the said Shell Oil Company, a corporation, that said Shell Oil Company, a corporation, will pay all costs which may be awarded against it on said appeal or on dismissal thereof, not exceeding the sum of Two Hundred Fifty Dollars ($250.00) which amount the said American Automobile Insurance Company acknowledges itself to be firmly bound by these presents.

In Witness Whereof, the said American Automobile Insurance Company has caused its name to be hereunto subscribed and its corporate seal affixed by its duly authorized officer this ..... day of August, 1956.

[Seal] AMERICAN AUTOMOBILE INSURANCE COMPANY,
Surety;

By /s/ L. W. RAEDER,
Attorney-in-Fact.

Countersigned by:

RAEDER, VAN DEUSEN & LINK AGENCY;

By /s/ L. W. RAEDER,
Resident Agent.

[Endorsed]: Filed August 23, 1956.

[Title of District Court and Cause.]

No. 1876

MOTION FOR ORDER EXTENDING TIME TO FILE RECORD AND DOCKET CAUSE

The appellant herein moves the court for an order extending the time to file the record on appeal and docket the cause in the appellate court to and including the 21st day of November, 1956, upon the ground that the Notice of Appeal was filed on the 23rd day of August, 1956; that forty (40) days from that date have not yet elapsed and that because of the necessity of obtaining a transcript of the testimony herein and because said transcript has not yet been completed, additional time is necessary to properly prepare the record for the appellate court.

Dated September 28, 1956.

/s/ CLAUDE MARCUS,
Attorney for Appellant.

[Endorsed]: Filed September 28, 1956.

[Title of District Court and Cause.]

No. 1876

ORDER EXTENDING TIME TO FILE RECORD AND DOCKET CAUSE

Upon motion of appellant and good cause appearing therefor,

It Is Ordered that the time within which to file the record and docket the above-entitled cause in the United States Court of Appeals for the Ninth Circuit be, and the same hereby is, extended to and including the 21st day of November, 1956.

Dated October 1, 1956.

/s/ FRED M. TAYLOR,
District Judge.

[Endorsed]: Filed October 1, 1956.

In the United States District Court for the District of Idaho, Eastern Division

No. 1876

LANUS WAYNE PRESTIDGE,

Plaintiff.

vs.

SHELL OIL COMPANY, a Corporation; ROCKY MOUNTAIN OIL CORPORATION, a Corporation, and STONY POINT DEVELOPMENT, INC., a Corporation,

Defendants.

REPORTER'S TRANSCRIPT

This matter was tried before the Honorable Fred M. Taylor, United States District Judge for the District of Idaho, sitting with a jury, at Pocatello, Idaho, May 24, 1956.

Appearances:

Plaintiff:

GLENN C. COUGHLAN,
MILTON ZENER.

Defendant Shell Oil Company:

CLAUDE MARCUS,
GRANT C. AADNESEN.

(Jury duly selected.)

The Court: You may make your opening statement.

Mr. Coughlan: If it please the Court, counsel, and ladies and gentlemen, it is now my privilege to discuss with you what we expect to prove and what this case is all about. The evidence will show that a man by the name of Ragnar Barhang obtained an oil lease to acreage in Bear Lake County, Idaho, in the year of 1952; that subsequent to this Mr. Barhang assigned this lease to the Shell Oil Company and then the Shell Oil Company assigned a portion of the lease to a firm of well drillers by the name of Wheeler and Gray with the consent—I should say Shell assigned to Wheeler and Gray and made a contract with Wheeler and Gray to drill a test well on this acreage. Subsequently the Wheeler and Gray drilling firm assigned their contract to Rocky Mountain Oil Corporation, a drilling firm, with the consent of Shell Oil Company, and then Shell Oil Company made a partial assignment of the land to Rocky Mountain providing that certain things would be done as to tests that would be made

for Shell Oil Company whenever they asked; that they had the right to have their geologist on the premises and that in the event there was oil produced that Shell would have 12½ per cent of the production, a certain percentage of the gas if [2*] there was gas, and in the event it was a dry hole that Shell Oil Company would contribute up to $8,250 payment for the drilling. The evidence will also show that Shell Oil Company located the well as to where it was to be drilled, and the evidence will reveal that this well is surrounded by land which was retained by Shell Oil Company, and then they also agreed to assign to Rocky Mountain Oil Company acreage amounting to 2600 acres in this same area, blocked in what they refer to I believe as a checkerboard arrangement. In other words, they would have one section and Shell would have a section and Rocky Mountain would have a section. That is a portion of land, I don't mean a whole section of land. Now then Rocky Mountain proceeded to commence the drilling; however, before this drilling on or about July 20, 1953, Shell Oil Company filed with the Department of Land Management an instrument in which they designated Rocky Mountain Oil Company as their agent and operator. The operation was commenced and they drilled approximately to a place around a thousand feet and then they sent—the Shell Oil Company sent a geologist to the premises by the name of McIntyre. Mr. McIntyre arrived in Mont-

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

pelier about the 30th of May, I believe, and the 31st or 1st of June went out to the premises. They were not working at [3] that time, and then on the 2nd of June went back to the premises and was there when the occurrence happened which we are concerned with here. My client, the plaintiff, Mr. Prestidge, on the 1st of June, along with another man by the name of Wuthrick, contacted in the hotel a Mr. Robinson, who was the driller at Rocky Mountain, with respect to employment. Mr. Robinson advised them that they were to come to the site the next morning and he would see if there was any position for them. They did go to the site the next morning, arriving there about 7:00 or 7:30, and Mr. Robinson was asleep in a truck and so they waited around and they had a fire at the oil well site, which was in a five-gallon can with the top cut out and there was waste or some material in there and that was burning. They were standing around this fire and a man by the name of Doman, one of the employees of Rocky Mountain, took a quart can filled presumably with diesel and poured it on this fire to replenish the fire and the fire burned for a little while and then he took a large five-gallon can containing diesel with a spout, and at that time I believe the evidence will show that Mr. Prestidge was standing in the—to the rear of Mr. Doman, several steps back, and the evidence will show without question, I believe, that this fire was blazing and notwithstanding that Mr. Doman poured the oil from this large can on to the fire, resulting in an immediate explosion which whirled him around, and

the effect being that he threw the burning oil on Mr. Prestidge. Mr. Prestidge then made an effort to extinguish the flames and I believe Mr. Doman threw him to the ground and rolled him around on the ground and extinguished the flames, but before this could be done he had received severe burns on his legs, from his waist down; on his wrists and hands and on his face. I believe the evidence will show that these burns, at least on the legs, were of third degree. They immediately placed Mr. Prestidge in an automobile and rushed him to the hospital, where he was attended by a Doctor "Lindsey." The treatment required cleaning of these wounds, and of course Mr. Prestidge, I think the evidence will show, was in extreme shock. It required him to remain in the hospital for a period of 44 days, resulting of course in a large hospital and doctor bill. This procedure of treatment required dressings and cleansing of the wounds, and required Mr. Prestidge to be flat on his back. He couldn't move and had all of the attendant extreme pain that would result from such a serious occurrence. Then Mr. Prestidge left the hospital and was required to convalesce for a period of time, as a result of this occurrence he has difficulty now with circulation. Of course, the skin breaks [5] easily when he strikes it. He has pain in his legs. He has limitation of motion which will remain permanently with him. The evidence we will show will establish that Rocky Mountain and Shell Oil Company were engaged in this enterprise as a joint

venture, and that Rocky Mountain was the agent of Shell Oil Company, and of course as we contend Shell is responsible for this occurrence. I believe that that in general covers the situation so far as we are concerned.

Mr. Marcus: Your Honor, may we present a matter?

The Court: Yes. I will excuse the jury first. Ladies and Gentlemen of the Jury: We will now take a brief recess. It will be your duty during this recess and all recesses or adjournments during the course of this trial, not to discuss the trial, or any matter pertaining to the trial among yourselves as members of the jury, or with anyone else, and it will be your duty not to allow anyone to discuss it in your presence. If anyone mentions any matter connected with this trial in your presence or to you, you will tell them that you are a member of the jury and that they should not discuss it, and if they insist on their discussion, you will report them to the Court. You will understand that the reason for this is that the jury should hear all the evidence in the case, the argument of counsel and the instructions of the Court, free from any outside influence. You will remember [6] this admonition so that it will not be necessary for me to take up your time in repeating it at each adjournment.

(Jury retired.)

The Court: You may proceed.

Mr. Marcus: Your Honor, as we discussed yesterday we would like to maintain our record in this

case identical to that in the previous Wuthrick case, and at the same points in the trial of this case we would like to show identical motions and merely let the reporter copy all the motions and grounds at those points if that is agreeable with counsel.

Mr. Coughlan: I have no objection to that.

The Court: The record may show the same motions made at the same points as were made in the former case, and the same ruling of the Court.

Mr. Marcus: At this time the defendant Shell Oil Company moves the dismissal of the action by the plaintiff herein under Rule 41 (b) of the Rules of Civil Procedure on the ground and for the reason, your Honor, that the opening statement of counsel shows non-liability on the part of the defendant. His statement of the facts indicated that this well was being drilled under contract between the Rocky Mountain Company and the Shell Oil Company, and that the negligence, if any, in this case was that of an employee of the Rocky Mountain Oil Corporation. On the basis of his statement of facts which shows [7] non-liability I move the dismissal of the action.

The Court: The motion will be denied. We will take a short recess. [8]

LANUS WAYNE PRESTIDGE

the plaintiff herein, called as a witness, being first duly sworn, testified as follows, upon

Direct Examination

By Mr. Coughlan:

Q. Will you state your name, please?

A. Lanus Wayne Prestidge.

Q. Where did you reside on or about the 2nd of June, 1954? A. Montpelier, Idaho.

Q. How long had you been residing there?

A. Well, I would say close to a year or something like that.

Q. Speak right up so the jury can hear you. What is your age? A. I am 22 now.

Q. Are you married? A. I am.

Q. Do you have any children?

A. No, sir, I don't.

Q. Now calling your attention to the first part of June of 1954 did you inquire of someone concerning employment? A. Yes, sir, I did.

Q. Who was that? A. Mr. Robinson.

Q. And where?

A. That was at the Burgoyne Hotel at Montpelier.

Q. Do you know what Mr. Robinson did? [9]

A. Well, he was some sort of boss out there at the drilling rig.

Q. What kind of employment were you asking for?

(Testimony of Lanus Wayne Prestidge.)

A. Well, roughneck, anything that pertained to the drilling out there.

Q. What did Mr. Robinson tell you at that time?

A. He said at that time that the rig was broken down and for us to come out early the next morning, and if it was in operation there might be a place for us to work.

Q. And then did you go out the next day?

A. Yes, sir, I did.

Q. And what day was that as you recall?

A. It was about June 2nd, somewhere in there.

Q. Could it have been the first of June?

A. Possibly could, I couldn't say for sure.

Q. And where was that rig located from Montpelier?

A. It was about 12 or 15 miles northeast of Highway 89, and then you turn left and it is about three miles back on another road.

Q. What time did you arrive at the rig?

A. Somewhere between 7:00 and 7:30.

Q. After you arrived there what did you observe?

A. Well, we got there and Mr. Robinson was asleep in the truck, so we thought we would wait on him. You know, wait until he got up, and they had a can of diesel—can of fire there— [10] some kind of fire over there—bunch of guys was around, and we thought we would go over and warm and wait for him to get up.

Q. Please describe the premises.

A. Well, the rig set down between two moun-

(Testimony of Lanus Wayne Prestidge.)

tains where it came together in kind of a horseshoe and slush pit was kinda on the side, and the water was right on the northwest side, and the engines was on the due south.

Q. Describe this fire, if you will?

A. Well, it was in a five-gallon can with the top cut out of it.

Q. Was there anything inside of the can?

A. I think so, sir, I am not sure.

Q. How far away from this fire was the rig?

A. Roughly I would say about 10, 15, maybe 20 foot.

Q. Now what occurred then?

A. We went over to the fire like I say to warm, and the fire kinda burned down and this Mr. Doman took a small can, I believe it was a quart can, and said "We might as well build it up a little bit," and at that time I moved away kinda to his rear and kinda turned my back to him.

Q. And what did Mr. Doman do then?

A. Well, I couldn't say for sure. I think he took a five-gallon can——

Mr. Marcus: Your Honor, we object to this testimony. He indicated he didn't know by saying he wasn't sure. [11]

The Court: Objection sustained. He may only testify as to what he knows and what he saw.

Q. What was the next thing you observed, Mr. Prestidge?

A. Only thing I know is that I heard kinda a boom and swoosh sound, and must have kinda

(Testimony of Lanus Wayne Prestidge.)

turned and a big ball of fire hit me right in the face.

Q. Where were you then?

A. Best I remember I was coming to Mr. Doman's rear.

Q. Do you know how far away from the fire you were?

A. I was approximately six or eight steps, something like that.

Q. Did Mr. Doman have anything in his hands at that time?

A. You mean when I got caught on fire?

Q. Yes.

A. Well, I couldn't say because all I remember is just that big ball of fire hitting me and kinda hard to say. I think he had something in his hands. I don't know for sure.

Q. Now who was Mr. Doman, do you know?

A. I understood he was an employee of Rocky Mountain Oil Company.

Q. And was there anyone else there?

A. There was quite a few gentlemen standing around.

Q. Was someone with you that morning?

A. Not that I recall.

Q. Did someone go to the rig with you?

A. Yes, Mr. Wuthrick. [12]

Q. When you heard this boom and swoosh, what happened to you then?

A. Well, I was on fire and I was trying to put the fire out, and I really don't know for sure what did happen then.

(Testimony of Lanus Wayne Prestidge.)

Q. Did anything happen to any part of your body then?

A. Yes, sir, I was burned from the waist down, and around the face and around the wrists.

Q. Now this explosion, did that occur when he poured the oil out of the can on the fire?

A. Yes, sir, I think so.

Q. What was done with you?

A. Well, they put me in a car and took me to Montpelier to the hospital.

Q. How long did you remain in the hospital?

A. I think it was 44 days.

Q. Were you attended by any doctor?

A. Yes, sir, I was attended by Doctor Lindsay.

Q. And what treatment did Doctor Lindsay give you?

A. Well, when we first got there he put some sort of ointment on the burns and wrapped it with a heavy gauze and bandage and gave us some kind of shots, I don't know what they were.

Q. Did you see your legs at that time?

A. At the time they were putting the ointment on?

Q. Yes. [13]

A. No, sir, not too closely, I was——

Q. Did they change these dressings while you were in the hospital?

A. Yes, sir, they changed them about every three or four days.

Q. How did your legs feel, were they painful?

A. Yes, sir, they were quite painful. They had

(Testimony of Lanus Wayne Prestidge.)

a terrible burning all the time. It is hard to describe just what they felt like. The best way to describe is it was just like taking a blow torch and gradually melting off the flesh off of you.

Q. What about your hands and face, how did they feel?

A. Well, it was a burning, hurting, feeling all the time.

Q. And did they treat your hands and face also?

A. Yes, sir, they did.

Q. What was involved when they changed your dressings, Mr. Prestidge?

A. Well, I was in a private room and Doctor Lindsay and about three or four nurses would come in there and two of them would come up and hold my head and two of—that is hold my head and hands down where I couldn't raise up, and one or two nurses would help Doctor Lindsay, and they would have to clip the bandages down through there and just peel them off, just be like peeling a potato or something, taking the hide right off.

Q. Did that cause you any pain? [14]

A. Tremendous pain.

Q. And what about narcotics; did you receive any narcotics? A. Yes, sir, I did.

Q. And do you know how often?

A. Not for sure, sir, it was quite frequent, though.

Q. Were those by means of injection?

A. Yes, sir.

Q. Needles? A. Yes, sir.

(Testimony of Lanus Wayne Prestidge.)

Q. Now during the time you were in the hospital did you observe your legs while the dressings were off? A. At one time, I did, sir.

Q. What was their appearances?

A. Well, they were real small, about like a match stick—I mean something like that, and all shriveled up, and they just looked terrible.

Q. Remember to speak up so they can all hear you. Was there any odor connected with your legs?

A. Yes, sir, there was a lot of odor connected with it.

Q. What did that smell like?

A. Well, on burns you have to let the burned flesh decay off, and if you ever smelled decaying flesh or anything like that you know what it is then.

Q. What position did you maintain while you were in the hospital?

A. Most of the time I was flat on my back. [15]

Q. Mr. Prestidge, would you kindly stand up and raise your trousers and show your legs to the Court and jury?

A. (Witness did as requested.)

Q. Now are those scars on your legs the result of these burns? A. Yes, sir, they are.

Q. And what did you do after you got out of the hospital?

A. Well, I had to go home and stay there for quite a while, and then go and see the doctor every day for a while and then it was every other day.

Q. What treatment was he giving you during that time?

(Testimony of Lanus Wayne Prestidge.)

A. He kept putting this ointment on my legs all the time and checking them all the time.

Q. Have you had any difficulty with your legs since you got out of the hospital?

A. Yes, sir, I have.

Q. What was that?

A. Well, they are stiff. I sit in one position too long they get stiff on me, and I just hit them the wrong way or something they break open and they are hard to heal, and I can't run like I used to could. Only thing I can do is trot or walk fast. I don't have the same movements I used to have.

Q. How about bending your knees or squatting down?

A. I can't squat down like I used to be able to do.

Q. Have you had any difficulty in securing employment as a result of these burns? [16]

A. Yes, sir.

Mr. Marcus: Move to strike that for the purpose of an objection.

The Court: It may be stricken for the purpose of your objection.

Mr. Marcus: Object to it as calling for a conclusion, leading and suggestive.

The Court: He may answer.

A. Yes, sir, I have.

Q. Explain about that, please?

A. Well, I went to one up in Houston and I was turned down. They said on account something

(Testimony of Lanus Wayne Prestidge.)

might come up later. They looked at my leg and they said they couldn't possibly hire me.

Mr. Marcus: Move to strike that for the purpose of an objection.

The Court: It may be stricken.

Mr. Marcus: Object to the answer on the ground it is a conclusion, and that it is hearsay.

The Court: Objection overruled.

Mr. Coughlan: May the answer be reinstated, your Honor?

The Court: Yes.

Q. Who looked at your legs at this time you are referring to?

A. The gentleman there at the automatic gun company in Houston. [17]

Q. Did any doctor look at your legs?

A. It was a doctor of the company, a company doctor.

Q. Do you know anything about your legs during the change of the weather?

A. Yes, sir, I do, extreme cold weather they bother me a lot, and if it is too hot they bother me. They get dry in the joints and knees. They hurt a lot and ache, and if it starts to rain I can usually tell when it is going to rain or something like that.

Q. Do you notice anything about your legs when it is cold?

A. Yes, sir, it has a tingling, hurting feeling in it, aching.

Q. What was that last?

(Testimony of Lanus Wayne Prestidge.)

A. It has aching in the joints and things like that.

Q. Try and speak up as much as you can, Mr. Prestidge. Have you been submitted bills for your treatment in the hospital by the doctor?

A. Yes, sir, I have.

Q. Handing you Plaintiff's Exhibit 1, I will ask you if you have seen that before?

A. Yes, sir.

Q. And what is that?

A. That is a bill from Doctor R. B. Lindsay.

Q. Is that in connection with treatment for your legs? [18] A. Yes, sir.

Q. What is the amount of that bill?

Mr. Marcus: It has not been admitted in evidence as yet.

The Court: No, it has not.

Q. Will you examine Plaintiff's Exhibit 2?

A. (Witness did as requested.)

Q. What is that?

A. That is a bill from Bear Lake Memorial Hospital.

Q. And is that in connection with the time you were in the hospital for these burns?

A. Yes, sir, it was.

Mr. Coughlan: I offer in evidence Exhibits 1 and 2.

Mr. Marcus: Object to these offered exhibits on the ground of insufficient identification.

The Court: Objection overruled, they may be admitted.

(Testimony of Lanus Wayne Prestidge.)

Q. What is the amount of the bill from Doctor Lindsay, being Plaintiff's Exhibit 1?

A. $316.00.

Q. And what is the amount of the hospital bill, being Exhibit No. 2? A. $592.85.

Q. And have these bills been paid?

A. No, sir.

Q. Mr. Prestidge, following these burns were you unconscious [19] at any time?

A. Yes, sir, I think so.

Q. Was that immediately following the incident or when was that?

A. No, sir, I remember everything—going to the hospital and everything like that.

Q. That was after you got in the hospital?

A. Yes, sir.

Q. Handing you Plaintiff's Exhibits 3, 4 and 5; will you examine those and tell me what they are?

A. Yes, sir, they are pictures of my legs.

Q. And when were those taken?

A. Somewhere in January, 1955.

Q. Where were they taken?

A. Montpelier, Idaho.

Q. And do you know by whom?

A. No, sir, I don't know the gentleman.

Q. Do they accurately portray the appearance of your legs at that time? A. Yes, sir.

Mr. Coughlan: We offer for purposes of illustration Plaintiff's Exhibits 3, 4 and 5.

Mr. Marcus: May I ask some questions in aid of an objection?

(Testimony of Lanus Wayne Prestidge.)

The Court: Yes. [20]

Q. (By Mr. Marcus): Mr. Prestidge, you do remember who took those pictures?

A. No, sir, I don't remember the gentleman's name.

Q. Of course you didn't take them, did you?

A. No, sir, I didn't.

Q. At whose request were the pictures taken?

A. I believe Mr. Coughlan's request.

Q. And was it some photographer in Montpelier?

A. Yes, sir, I believe so.

Mr. Marcus: Your Honor, we object to these pictures on the ground of not being able to examine the party who was taking them, and on the ground that they are incompetent, irrelevant and immaterial.

The Court: May be admitted for illustrative purposes only.

Mr. Coughlan: May they be handed to the jury?

The Court: They may.

(Exhibits 3, 4 and 5 handed to the jury.)

Cross-Examination

By Mr. Marcus:

Q. Mr. Prestidge, where do you presently reside? A. At Kemah, Texas.

Q. How long have you lived there?

A. Off and on all my life.

Q. Was that your residence at the time you were up at Montpelier? [21]

(Testimony of Lanus Wayne Prestidge.)

A. No, sir, I was living at Montpelier at the time.

Q. How long did you reside in that community?

A. Well, right at a year, I would say. I couldn't say for sure.

Q. You think then your residence has been Texas?

A. Well, Texas, Wyoming, Louisiana.

Q. What type of work have you followed and done since this occurrence?

A. Well, I went to work for Murray Rubber Company, molded rubber for oil field purposes, and things like that, and left there and come up here. I went back and worked a few days, and there was a lot of heat in there bothering my legs, and I got a chance to go to work at Sears-Roebuck and I went to work for them.

Q. How long did you work for them?

A. For Sears?

Q. Yes. A. About seven months.

Q. What type of work were you doing for Sears? A. I was a salesman.

Q. Was that a salesman on the floor of the store?

A. Yes, sir.

Q. What work did you do after that?

A. Well, I went to Louisiana on a job and I worked down there for A. R. "Siley." He was a labor foreman. [22]

Q. How long were you on that job?

A. About three weeks.

Q. What type of work was that?

(Testimony of Lanus Wayne Prestidge.)

A. Different types of work, contract construction work and things like that.

Q. Did that involve moving around quite a bit, what were your duties in connection with that work?

A. I was there to make sure the other men were on the job, kept time and books and things like that.

Q. Are you with them at the present time?

A. Left them to come up here on this case.

Q. You are presently employed with that same company?

A. Well, I wouldn't say I was presently employed. I probably could go back and get a job with them.

Q. You have terminated your job with them?

A. I told them I had to come up here, drew my pay and come up.

Q. What types of work did you follow prior to the time of this occurrence?

A. Well, I worked for—you mean before this accident?

Q. Yes.

A. I was in construction and some oil field work, and things like that.

Q. Any other types of work you followed?

A. Well, in the Navy.

Q. I didn't get that. [23]

A. I was in the Navy.

Q. And other than that you have followed construction work? A. Yes, sir.

Q. And those were the only types of work you followed prior to the time of this occurrence?

(Testimony of Lanus Wayne Prestidge.)

A. Yes, sir.

Q. And since that time you have in general followed the same type of work you did before?

A. No, sir, I spent most of my time since then with Sears-Roebuck.

Q. You say that prior to the time you went out to this site where this accident took place you contacted Mr. Robinson? A. Yes, sir.

Q. Did you contact anyone else with reference to work out there?

A. I think Mr. Windolph was with him at the time.

Q. There was Robinson and Mr. Windolph?

A. I think so, I am not sure.

Q. Who were those two men working for?

A. I really couldn't say. I understood they were the bosses on the rig out there.

Q. You say you don't know at this time, or didn't at that time know who they were working for?

A. No, I couldn't say. I understood they were the bosses out there for Rocky Mountain Oil Company or something. [24]

Q. You recall testifying in a previous trial of this action; do you not? A. Yes, sir.

Q. Do you recall a question to this effect: "Who did you contact?" Your answer was, "I contacted Mr. Robinson and Mr. Windolph." Question—"Do you know who those men were?" Answer—"Yes, they were employees of the Rocky Mountain Oil Company." Was that your answers at that time?

(Testimony of Lanus Wayne Prestidge.)

A. It must have been, sir, yes.

Q. And at that time you did know who these men were working for, did you?

A. Well, like I say, I thought they were working for Rocky Mountain Oil Company. I am pretty sure they were.

Q. Was that the company that was carrying on the drilling operations out there, Mr. Prestidge?

A. So far as I know it is, yes.

Q. And you were aware of that at the time you contacted these men and at the time you went out to the drill site? A. Yes, sir.

Q. Had you at any time prior to that time contacted the Shell Oil Company with reference to employment? A. No.

Q. You and Mr. Wuthrick drove out to where the well was being drilled, at about what time did you go out there that morning?

A. About 7:00 or 7:30, somewhere in there. [25]

Q. Did you drive out with him in his car?

A. Yes, sir, I rode out with him.

Q. Will you tell us again where the drill site was located?

A. It was about 12 or 15 miles northeast of Montpelier, Idaho, and you turn left about three miles off the road.

Q. You say you turned left off the public road?

A. Off Highway 89, yes, sir.

Q. How did you get up to the drill site from the public road?

A. Followed a road up through there by car.

(Testimony of Lanus Wayne Prestidge.)

Q. Was that just a temporary road that had been built there by this—by those people who were drilling the well?

A. I can't say who it was built for.

Q. Did that road extend on beyond the drill site?

A. I didn't notice, sir.

Q. And you and Mr. Wuthrick arrived up there you say about 7:30 in the morning?

A. Between 7:00 and 7:30, somewhere in there.

Q. What was the weather like at that time?

A. It was quite cold and still had a little frost and stuff around there.

Q. That was the reason they had this fire up there at the drill site, was it? A. Yes, sir. [26]

Q. So the men could keep warm, is that what they were using it for? A. Yes, sir.

Q. Where did you park your car with reference to the place where the fire was burning?

A. Well, it was quite a way from it. That would be hard to judge the exact distance how far it was.

Q. Where was the fire burning with reference to their tool house, or buildings they were using there at the site?

A. I don't remember the tool house, sir.

Q. Was there some building there that the men were using? A. I don't remember of any, sir.

Q. Where was the fire with reference to where you say Mr. Robinson's car was located?

A. His car—the truck he was in was north of the fire, where the fire was at.

Q. About how far from the fire was his car?

(Testimony of Lanus Wayne Prestidge.)

A. I don't know, 25 or 30 yards, something like that.

Q. Did you and Mr. Wuthrick then proceed to walk up to the fire? A. Yes, sir.

Q. How were you and he dressed at that time?

A. Well, had on khaki trousers and shirt, jacket and cap.

Q. And did you approach the fire and stand around it to keep warm? [27] A. Yes, sir.

Q. It was cold enough to be uncomfortable unless you were near a fire or some place with heat?

A. Yes, sir.

Q. And the reason you approached it and went up to the fire was to stand around there and get warm? A. That is right, sir.

Q. You didn't go up there to interview any of these representatives or employees of the Rocky Mountain Oil Corporation with respect to work?

A. No, sir.

Q. Now on what side of the fire did you stand when you first approached it?

A. Well, I can't say for sure. We moved around, it would be hard to say what side of the fire I was on.

Q. How long were you up there near the fire before the accident occurred?

A. We must have been up there half an hour or so, maybe a little longer. I really couldn't say.

Q. And you remained there continuously, did you, from the time you approached the fire you stood around there until this occurrence; is that

(Testimony of Lanus Wayne Prestidge.)

right? A. Around there somewhere, yes, sir.

Q. What were the other people around there?

A. I don't recall their names. There were a few other gentlemen around there. I do recall one of them called "Shorty" [28] and that is all I know.

Q. Now you observed Mr. Doman pick up the small can? A. Yes, sir.

Q. And apply some fuel to the fire?

A. Yes, sir.

Q. Where were you at that time?

A. I think I was coming to his left and when he picked up the small can I walked away back to the rear of him.

Q. And did you remain there until he applied the oil from the other can?

A. To the best of my knowledge I did, yes, sir.

Q. How much later was that after he did it the first time?

A. I couldn't say for sure. It wasn't too long though.

Q. A matter of a few minutes?

A. Something like that, just a little while.

Q. Did you actually see him pick up the can the second time?

A. No, sir, I didn't actually see him pick up the can, no.

Q. Had you turned your back to him before that time?

A. I about half way had my back toward him, yes, sir.

(Testimony of Lanus Wayne Prestidge.)

Q. Which way were you turned when he picked up the can the second time?

A. I couldn't actually say. I must have had my back to him or something like that. [29]

Q. Where was Mr. Wuthrick at that time?

A. I couldn't say where he was at that time.

Q. Isn't it a fact that you and Mr. Wuthrick had walked around and were on the opposite side of the fire at the time of this occurrence?

A. No, sir, not that I know of.

Q. You say not that you know of?

A. No, sir, to the best I remember I was standing to the rear of Mr. Doman.

Q. How far behind him were you?

A. Well, I would roughly say six or eight, maybe ten steps.

Q. And the first you observed was the fire that you say hit you? A. Yes, sir.

Q. Had you turned around prior to the time it hit you?

A. You mean before I got caught on fire?

Q. Yes.

A. When I walked away from him, no, sir. After I walked from him I didn't turn around until I heard the boom and swoosh sound. I must have tried to spin around or something and I seen a big ball of fire coming.

Q. You don't know where Mr. Wuthrick was standing at that time?

A. Not for sure, no, sir, I don't. [30]

Q. Did you object at any time to Mr. Doman, the

(Testimony of Lanus Wayne Prestidge.)

employee of the Rocky Mountain Company, pouring oil on the fire? A. No, sir.

Q. I believe in this case you have alleged that this occurrence took place on June 2nd?

A. Well, June 2nd, somewhere in there. I couldn't really say.

Q. As a matter of fact, Mr. Prestidge, the doctor bill showed you were first treated June 1st; is that right? A. It says 6/1/54.

Q. And with refreshing your mind with that reference you know now that the occurrence actually took place June 1st; is that correct?

A. It has been some time ago, sir, I couldn't say exactly what date it was.

Q. When were you finally released from the doctor's care, Mr. Prestidge?

A. Well, I don't know. I was released 7/15/54 from the hospital, and then I had to go see him after that.

Q. Is that the total bill for the doctor?

A. Yes, sir.

Q. Does that show the date of his last treatment?

A. No, sir, just shows when I was released from the hospital.

Q. Do you have any recollection of your own as to when you were released from his care? [31]

A. No, sir, not for sure.

Q. About how long was it after you were released from the hospital?

A. It was a couple or three weeks, somewhere in there.

(Testimony of Lanus Wayne Prestidge.)

Q. When was the first time that you started to work after being released?

A. Well, about two or three weeks later I went to work here at Lava. I went to see the doctor and I went to work as a bartender for Mr. Smith. The doctor said I could work inside but strictly no outside work whatever because I still had open places on my legs.

Q. That was about two weeks after you——

A. Somewhere in that neighborhood, yes, sir.

Q. So you did this work in addition to the work you first described to us? A. Yes, sir.

Q. How long did you do that kind of work?

A. Well, I was there a couple of months, something like that.

Q. And then you quit, did you, and returned to Montpelier?

A. I went to work for "Wisefield" as a salesman.

Q. I didn't get the name of that company.

A. "Wisefield."

Q. What type of work were you doing for them?

A. I was selling.

Q. How long did you do that work? [32]

A. I was there about a month or something like that.

Q. Was that at Montpelier?

A. No, sir, throughout Oregon and Idaho.

Q. You were travelling during that time?

A. Yes, sir.

Q. Driving your own car? A. Yes, sir.

The Court: I think we will recess until 2:00 this afternoon. Please remember the admonition of this morning.

2:00 P.M.

The Court: You may proceed.

Mr. Marcus: We have completed our examination of the witness.

The Court: Any redirect?

Mr. Coughlan: No, we have no further questions. [33]

Mr. Coughlan: At this time, your Honor, we would like to move the publication of the deposition of Rufus Doman.

Mr. Marcus: We object to the publication of this deposition on the ground no proper foundation has been laid for the deposition, not shown at the present time that the witness could not be present to testify in person.

The Court: The question is whether he is present now. Is he present now?

Mr. Coughlan: He is not.

The Court: The deposition may be published. You are to consider this testimony just the same as if the witness were testifying. It is a deposition in absence of the witness.

(Discussion off the record.)

Mr. Coughlan: This deposition was taken on behalf of the plaintiff, Mr. Prestidge, at Montpelier, Idaho, on the 19th day of March, 1955, with the consent of Mr. Marcus and myself. Mr. Doman was first duly sworn to testify to the truth, the whole

truth, and nothing but the truth, relating to the cause.

(Deposition then read as follows:)

"Direct Examination

"By Mr. Coughlan:

"Q. What is your name?

"A. Rufus Leonard Doman. [34]

"Q. Where do you reside?

"A. In Montpelier.

"Q. By whom were you employed on the 2nd day of June, 1954?

"A. Rocky Mountain Oil Company.

"Q. Where were you employed at that time?

"A. In Bear Lake County, about twelve miles northeast of Montpelier, Idaho.

"Q. What was your particular job?

"A. At the time I was employed on the rig as a roughneck.

"Q. What was your rate of pay?

"A. $1.75 an hour.

"Q. Who was your immediate supervisor?

"A. Clarence Robinson.

"Q. That operation was one of oil well drilling?

"A. Yes.

"Q. Now, what time of day did you go to work on the 2nd of June?

"A. I believe we went to work the night before. Our hours were irregular.

"Q. What were your hours that particular shift?

(Deposition of Rufus Leonard Doman.)

"A. I believe four in the afternoon. I am not sure, maybe midnight, 12 to 8.

"Q. Were you still on the premises?

"A. It was before I went off shift. I don't remember the time. I went back out to the rig.

"Q. As best you remember, you worked from 12 to 8? That would be the 2nd of June. [35]

"A. Our hours were irregular.

"Q. Was there some sort of a fire there on the premises?

"A. Yes, there was a fire in an open oil can.

"Q. Was that used regularly there for a purpose?

"A. No. We ordinarily didn't have a fire only when it got chilly.

"Q. Do you know who built this particular fire?

"A. No.

"Q. Was the fire burning all night?

"A. Yes, I believe so.

"Q. Where was this can in which you say the fire was located with respect to the actual drilling?

"A. About thirty feet from the rig. On the southeast corner of the mud pit.

"Q. What do you mean by a mud pit?

"A. A mixture of water and a lubricant that they force through the bit to lubricate the bit from the drill. It was mixed in an open pit in the ground.

"Q. What was being used for fuel for this fire?

"A. Diesel.

"Q. What kind of container?

"A. An empty five-gallon motor oil can.

(Deposition of Rufus Leonard Doman.)

"Q. Did it have a spout? A. Yes.

"Q. Was Mr. Robinson there on the premises?

"A. Yes. [36]

"Q. Was he there all during your shift?

"A. Yes, as near as I can remember.

"Q. Was there any type of sign on the premises?

"A. Pertaining to what?

"Q. About visitors. A. I don't recall.

"Q. Was there an accident of some type that morning? A. Yes.

"Q. Will you state what happened?

"A. We were standing around the fire and it started to burn low, so I picked up the can of diesel and told everybody to stand back, that I was going to put some more fuel on the fire. While I was pouring the fuel, the can exploded. The explosion whirled me around and spilled the diesel. When I looked up, Wuthrick and Prestidge were on fire and running. I grabbed Prestidge and threw him to the ground and smothered the fire, and looked around and Wuthrick was still running, so we threw him to the ground and put out the fire on him. I loaded him in my car and brought him to the hospital. After that I went back to the rig.

"Q. Were you there when Mr. Wuthrick and Mr. Prestidge came to the site? A. Yes.

"Q. Had they been there before?

"A. Not that I recall.

"Q. They were not working there? [37]

"A. No.

(Deposition of Rufus Leonard Doman.)

"Q. Where were they standing in relation to you at the time you were pouring oil on the fire?

"A. In back of me.

"Q. Then as I understand it, when the explosion occurred it whirled you around and caused the lighted oil to go upon Prestidge and Wuthrick?

"A. Then when I looked back I could see they were on fire.

"Q. Where were they on fire as best you recall?

"A. All over, mostly on their legs, it seemed to be.

"Q. Where was Mr. Clarence Robinson?

"A. He was in the truck.

"Q. Was he asleep in the truck? A. Yes.

"Q. Did you ever see any geologist on the job there?

"A. There was a man collecting samples from the pit. I suppose he was a geologist.

"Q. How frequently did he do that?

"A. Daily.

"Q. Was he there the day that this occurred?

"A. Yes.

"Q. If you know, was he one of the geologists for the Shell Oil Company?

"A. I do not know.

"Q. Mr. Doman, did you observe Mr. Wuthrick and Mr. Prestidge after the fire was put out? [38]

"A. By observe them, do you mean——

"Q. Did you look at them?

"A. I didn't observe them closely. I loaded them in the car and took them to the hospital.

(Deposition of Rufus Leonard Doman.)

"Q. Did you observe as to whether or not any portion of their body was burned?

"A. It looked to be their legs were burned and their hands.

"Cross-Examination

"By Mr. Marcus:

"Q. Mr. Doman, you were employed and paid by the Rocky Mountain Oil Corporation for this work which you were doing there? A. Yes.

"Q. Was Mr. Clarence Robinson employed by the Rocky Mountain Oil Corporation?

"A. So far as I know. I don't know for sure.

"Q. And this was the company that was carrying on the work out there, meaning the Rocky Mountain Oil Corporation? A. Yes.

"Q. Were these two gentlemen who were burned, Mr. Wuthrick and Mr. Prestidge, working for that company at the time of this fire?

"A. I do not know, but I don't believe so.

"Q. Had they been there the night before?

"A. Not to my knowledge, they had not been there when I went off shift.

"Q. Did you say that your shift ended at 8 and you came to [39] Montpelier before this fire took place? A. I came after the fire.

"Q. The fire occurred before 8 in the morning?

"A. I believe so.

"Q. Do you know what time these two men first came to the place where the fire occurred?

(Deposition of Rufus Leonard Doman.)

"A. I believe it was about 45 minutes or one-half hour before the fire occurred.

"Q. Were you the only employee of the Rocky Mountain Oil Corporation who was there at the fire when they came on the job? A. No.

"Q. Who else was there?

"A. Clarence Robinson and a fellow named Shorty.

"Q. He was an employee of the Rocky Mountain Oil Corporation, too?

"A. Yes. It seems like there was another man employed but I don't recall his name.

"Q. Did you say that before the fire occurred, Mr. Robinson had gone to the truck and had gotten into the cab of the truck? A. Yes.

"Q. So he wasn't there at the time these two men were burned?

"A. He was on the premises about thirty feet from the scene of the accident.

"Q. But you think the other man was standing near the fire, too? [40]

"A. He was near it, too.

"Q. When you picked up the fuel to pour some of the fuel on the fire, where were Mr. Prestidge and Mr. Wuthrick?

"A. When I picked up the can they were standing near the fire.

"Q. Were they across the fire from you?

"A. No. They were on the same side of the fire as I was.

"Q. They were standing beside you. Were they

(Deposition of Rufus Leonard Doman.)

about the same distance from the fire that you were, just before you went to the can to pick it up?

"A. Yes, I would say they were.

"Q. Had you and they and anyone else been standing around the fire talking about the fire burning down if you didn't put some more fuel oil on it?

"A. Yes.

"Q. Mr. Wuthrick and Mr. Prestidge had participated in that little conversation about putting more fuel on the fire?

"Mr. Coughlan: We object to the question as not being proper cross-examination. This matter not having been gone into in anywise on direct examination of this witness."

The Court: He may answer.

"Q. Mr. Doman, will you answer that question? Did they also participate in this talk about the fire burning down and they should put some more fuel on the fire?

"Mr. Coughlan: Objection was that this calls for a conclusion of this witness so far as any [41] participation is concerned."

The Court: He may answer if he knows.

"A. I don't recall whether they participated in the conversation or not. We were all talking about it.

"Q. You say you were all talking about it to the best of your recollection? A. Yes.

"Q. You mean that these two gentlemen and the rest of you were all talking about it?

"A. I suppose so. We were all standing around the fire.

(Deposition of Rufus Leonard Doman.)

"Q. Had you all been talking about getting chilly or getting cold? A. I don't recall.

"Q. How were these two men dressed at that time, Mr. Doman?

"A. They had shirts and pants and coats as near as I recall.

"Q. Do you recall either or both of them saying anything about being chilly or getting chilly or cold?

"A. No.

"Q. When you stepped back to get the can of fuel, incidentally, was that the fuel that you had been using regularly to keep that fire going in the open fire you just described? A. Yes.

"Q. When you went back to get that can, did Mr. Wuthrick and Mr. Prestidge move from their former position around the fire? A. Yes.

"Q. Where did they move to when you went to pour the fuel [42] on the fire?

"A. They, with all the other fellows, moved around behind me away from the fire.

"Q. Did either Mr. Wuthrick or Mr. Prestidge voice any objections to your putting some more fuel on the fire? A. Not that I recall.

"Q. You observed that they had moved to a position in back of you before you actually poured any of the oil on the fire, did you?

"A. Yes. Everyone was clear of the fire except myself.

"Q. Had you or anyone else poured any of this fuel on the fire prior to that time, but after these two men had come up there? A. I don't recall.

"Q. In pouring this on your fire, Mr. Doman,

(Deposition of Rufus Leonard Doman.)

did you do it in any different manner or in any different way than you and others had been putting fuel on the fire before that time?

"A. No. We had replenished the fire several times during the night in the same way.

"Q. And I suppose you had done that many times in the preceding days and nights?

"A. Not usually. Only when it would start getting chilly. I suppose it had been used before but not on my shift.

"Q. Do you actually know what caused the explosion when you poured this fuel on your fire?

"A. No. I was under the impression that diesel did not [43] explode in that fashion.

"Q. You know that this was diesel oil in the can?

"A. Yes.

"Q. Had the flame burned down in this fire?

"A. No.

"Q. I mean prior to the time that you poured it?

"A. No. It was still blazing good.

"Q. How far behind you were these two men?

"A. I do not know. When I turned around they were running. It was impossible to say how far they were.

"Q. But you knew they and the other men were behind you before you poured any of your fuel oil on the fire? A. Yes.

"Q. Were you also burned by this explosion?

"A. Slightly, yes.

"Q. Were you acquainted with these two men prior to their coming out on the job? A. No.

(Deposition of Rufus Leonard Doman.)

"Q. They were strangers to you at that time?

"A. Yes.

"Q. Had they been employed by the Rocky Mountain Oil Corporation?

"A. I do not know.

"Q. Did they tell you why they had come out there?

"A. I don't remember. It seemed that they were looking for work. [44]

"Q. Was this place out in the open where anyone could come up to it?

"A. Yes. There was a gate across the road that had to be opened.

"Q. And they had opened the gate to come in to where you were?

"A. I don't know. It was outside of the rig.

"Q. But you knew at that time there was a gate across the road which they had to travel to get to where you were?

"A. Yes. We were opening and shutting the gate each time we came through.

"Q. As I understand it, this fire was in a part of the five-gallon can which had been cut in two?

"A. I don't recall. I believe it was the whole can. Just the top was out.

"Q. Was the can filled with sand or was it partly filled with sand?

"A. It was partly filled with earth.

"Q. So actually the fire was down in the can?

"A. Yes.

"Q. Have you seen either of these men, Mr. Wuthrick or Mr. Prestidge, since they recovered

(Deposition of Rufus Leonard Doman.)

from their injury? A. Yes.

"Q. Do they live in Montpelier?

"A. I don't know. [45]

"Q. Do you know what they have been doing since that time? A. No."

Mr. Marcus: The next is cross-examination by another party and I assume that should be out.

Mr. Coughlan: Yes. It continues on page 13 with redirect.

"Redirect Examination

"By Mr. Coughlan:

"Q. Mr. Doman, Mr. Marcus asked you about a gate that you went through to get to the drilling site. Where was this gate located?

"A. It was adjacent to the highway where the road to the drilling rig left the main highway.

"Q. Did it go through the right-of-way fence for the highway?

"A. I suppose there was a fence along the highway that the gate went through.

"Q. Approximately how far from the gate to the drilling site?

"A. Approximately two and one-half or three miles.

"Q. Did you have a conversation with a Mr. McIntyre of Rocky Mountain Oil Company?

"A. I have had conversations with him.

"Q. Was there any information imparted to you with respect to Shell Oil Compay?"

Mr. Marcus: To which an objection was made as

(Deposition of Rufus Leonard Doman.)

being irrelevant, incompetent, hearsay, and not [46] binding upon the Shell Oil Company.

The Court: Objection sustained.

"Q. Do you know by whom Mr. Ed Windolph was employed? A. No.

"Q. Did he have a conveyance there at the premises? A. Yes.

"Q. Did this conveyance have any sign on it?

"A. It had Stony Point Development printed on the side.

"Q. Was the man who picked up the samples daily present at the time of the accident?

"A. Yes.

"Q. And was he there for some time prior to the accident? A. For a while.

"Q. Was he also at the fire, standing around the fire? A. Yes.

"Recross-Examination

"By Mr. Marcus:

"Q. This idea of picking up some more fuel to put on the fire was yours, was it?

"A. More or less. I was under no orders to pour more fuel on the fire.

"Redirect Examination

"By Mr. Coughlan:

"Q. Mr. Doman, did you perform this act of replenishing the fire in the course of your employment there? A. Yes.

(Deposition of Rufus Leonard Doman.)

"Recross-Examination

"By Mr. Marcus:

"Q. With reference to that last question, Mr. Doman, you [47] mean that was part of your job. That it was your duty to attend that fire, and keep it replenished?

"A. No more mine than the other fellows' around there.

"Q. You hadn't been given instructions to take care of the fire? A. No.

"Q. Your job with the company was the other work that you have described here? A. Yes."

EDWIN W. WINDOLPH

having been first duly sworn, testified as follows, upon

Direct Examination

By Mr. Coughlan:

Q. Will you state your name?

A. Edwin W. Windolph.

Q. Where do you reside?

A. Brush, Colorado.

Q. What occupation do you follow?

A. Well, we are—I am self-employed. We have an uranium company, oil and construction.

Q. How long have you been in the oil business?

A. For quite some time.

Q. How many years would you say?

A. I think a little over 20 years.

(Testimony of Edwin W. Windolph.)

Q. And what different positions have you held in the oil well drilling business during that period of time?

A. Well, I have been on the floor, that is from roughneck on through.

Q. Well, will you just please explain?

A. Well, as a roughneck——

Q. Just explain the jobs on up?

A. Well, as a roughneck, they handle the tools and do the heavy work around the rig. The driller does the actual drilling with the crew under him, which are three or four [49] of the roughnecks and then over the driller is the tool pusher, and generally over that comes the operator or owner.

Q. And you have held all those positions during the years that you have been engaged in this business? A. Yes.

Q. And how many wells have you drilled or been connected with in some capacity or another?

A. Quite a few, quite a number.

Q. Could you give us an estimate of how many?

A. I would say between 25 and 30 possibly.

Q. Now is there another position in the drilling of a well that you did not mention?

A. Yes, there could be—could be the operator. It could be part of a working interest. There are numerous positions in the oil business that are actually not connected with the drilling of the well itself. There is the chemical side of it.

Q. I mean the entire operation.

A. The entire operation of drilling oil?

(Testimony of Edwin W. Windolph.)

Q. Yes. A. I imagine that——

Mr. Aadnesen: Object to what he imagines.

The Court: Yes, just state what you know.

A. Other positions pertaining to the well would be of course the operator, the leaseholder, the driller himself, the tool pusher, and then of course other aspects in drilling [50] a well would be the least part of it, the interest part of it—the geological part of it and so on.

Q. Taking into consideration your experience in this business, Mr. Windolph, what importance do you attach to the geological phase?

Mr. Aadnesen: Some questions on voir dire, your Honor.

The Court: All right.

Q. (By Mr. Aadnesen): Have you ever seen a geologist? A. No, sir.

Q. Do you have any geological knowledge of your own? A. No.

Mr. Aadnesen: Then we object to this question. He is not a geologist in this particular field.

The Court: He may answer.

A. With geology it is more of a sure operation, I would say, and without it you can become lost.

Q. Directing your attention to an oil well drilling operation in Bear Lake County commonly known as the Give Out Antecline; did you have some connection with that well?

A. Well, I was drilling superintendent for Rocky Mountain.

(Testimony of Edwin W. Windolph.)

Q. And do you recall what period of time that was?

A. My period of time was from the 24th day of April, until the 12th day of July. [51]

Q. And you were on this job when an accident happened on or about the 1st of June, 1954?

A. I was on the job. I wasn't at location at the time of the event.

Q. What did you do in preparation when you were taking over this job of superintendent there at Montpelier?

A. From beginning to the end?

Q. No, just preparation for the——

A. Well, preparations for the drilling of the well with the rotary rig. We moved in a rig from Border, Texas, and rigged it up and commenced drilling operations.

Q. Did you make any phone calls to any member——

Mr. Aadnesen: Object as leading.

The Court: Let him answer the question.

Q. Did you call anyone at that time in the Shell Oil Company organization concerning this operation?

Mr. Aadnesen: Objected to as leading.

The Court: He may answer.

A. Yes, but I was instructed by John McIntyre, president of the——

Mr. Aadnesen: Objected to, your Honor. What he was instructed by John J. McIntyre is not binding on the Shell Oil Company.

(Testimony of Edwin W. Windolph.)

The Court: Objection sustained. Just tell what you did. [52]

Q. What did you advise Mr. Gamble?

A. That we would be ready to commence drilling operations at a certain time.

Q. And do you know who Mr. Gamble is?

A. Yes.

Q. Who is he?

A. I think he is employed by Shell Oil Company.

Mr. Aadnesen: Object on the basis he says "he thinks."

The Court: Do you know?

A. No, I couldn't be positive, no.

Q. (By Mr. Coughlan): Do you know if he is connected with the Shell Oil Company in any capacity? A. Yes, I think so.

Mr. Aadnesen: I would like to go back there and have that stricken for the purpose of an objection.

The Court: Yes, it may be stricken. Answer the question, yes or no, Mr. Windolph.

(Pending question read by the reporter.)

Mr. Aadnesen: Object to that on the basis he previously said he didn't know.

The Court: He can answer it if he can answer it yes or no. [53]

Q. (By Mr. Coughlan): Do you remember the question now?

A. Yes, I do. I don't have positive proof that he

(Testimony of Edwin W. Windolph.)

is a member of Shell Oil Company. I would say, yes.

The Court: He answered the question "yes."

Q. And what did Mr. Gamble tell you?

A. I can't recall the conversation, but the call was that we were waiting for the geologist to arrive before we would commence operation.

Q. And did a geologist then arrive?

A. Yes.

Q. And who is he? A. Mr. McIntyre.

Q. And do you know whom—by whom he was employed? A. Yes.

Q. Who was that? A. Shell Oil.

Q. What date did he arrive?

A. I would say on or about June 1st.

Q. Did he contact you upon his arrival?

A. He contacted me at the Hotel "Burgoyne," whether it was at the time of arrival or not I don't know. It was his first arrival there.

Q. Was that prior to the accident? A. Yes.

Q. Did you have any discussion at the time he contacted you? [54]

A. No, I think we just talked in general.

Q. Did you talk anything about the oil well operation?

A. I don't think so, not that I recall.

Q. Do you recall furnishing Mr. McIntyre with any samples at that time?

Mr. Aadnesen: Object to that on the basis it is leading.

The Court: He may answer.

(Testimony of Edwin W. Windolph.)

A. Yes, I think we had collected some samples.

Q. And he looked at them then; is that right?

A. I think so, although I can't say positively.

Q. How long was Mr. McIntyre on the job there?

A. I think off and on. I think he left Montpelier twice due to failure and breakdown, but I believe the over-all length of time was approximately 30 days.

Q. How often would he be out to the site, would you say?

A. He would be out during the daytime and during the night at different intervals.

Q. He was on the job quite frequently, would you say?

A. Yes, he was a good geologist. He done his duty well.

Q. While you were drilling did you run a 24-hour shift?

Mr. Aadnesen: Objected to as indefinite as to the time, your Honor. [55]

The Court: I suppose it is indefinite, but if you want to tie it down that is something else.

Q. During the month of June did you run a 24-hour shift?

A. Yes, we operated around the clock.

Q. What did Mr. McIntyre do there?

A. He collected the samples.

Q. How were these samples taken?

A. Rocky Mountain furnished the sacks. They are a small sack about, I imagine contained about a

(Testimony of Edwin W. Windolph.)

pound and a half or two pounds of dirt, and the samples are taken from cuttings. They are forced out by mud and then they are washed and put in this sack. They are numbered as to the depth of the well where that particular sample was taken, and although not a true and accurate sample it is pretty close to that footage due to the time it takes to arrive from the bottom of the hole to the top, but each sample sack is tagged with the exact footage that the sample was taken.

Q. And did Mr. McIntyre suspend operations for the purpose of taking these samples?

A. I think on two occasions that we had some good oil shows, and that the bit was pulled off the bottom and samples were taken, yes.

Q. During the time those were taken, necessarily does the actual drilling operation cease?

A. Actual cuttings of the hole ceases, yes. [56]

Q. And at whose requests were these samples taken?

A. One time at Mr. McIntyre's request and possibly two, and I think once I requested they pull off the bottom.

Q. Was the examination of the samples made by Mr. McIntyre? A. Yes.

Q. Was the geological phase of this operation under Mr. McIntyre's direction?

Mr. Aadnesen: Objected to as leading. He testified he was not a geologist.

The Court: He may answer.

(Testimony of Edwin W. Windolph.)

(Pending question read.)

A. Yes.

Q. Did Mr. McIntyre have authority to ask for cores?

Mr. Aadnesen: Object to that as asking for a conclusion.

The Court: Objection sustained. It is what he did.

Q. Did Mr. McIntyre ask for any cores during your operation?

A. If I recall correctly, he asked me at one time if it was posssible to take a core if the showings became better. I advised him that it could be done and Clarence Robinson advised him it couldn't be done, so no core was taken.

Q. What was the condition at that time? [57]

A. We had lost circulation and we had no fluid in the hole.

Q. Does that in some way effect the ability of taking the core, or did it at that time?

A. Yes, it does because your hole must be full of fluid and at that time every time we would have the good oil show we would be faced with lost circulation and the hole would have no fluid in which to get any cuttings.

Q. What procedure is followed in taking a core?

A. Procedure involved in taking a core is that you must first come from the hole and take off your bit and then replace it with a core barrel, a conventional head or diamond head, go back in and

(Testimony of Edwin W. Windolph.)

take the core. Before you take the core you must condition your mud so as to be able to take your core and take your core and come back out, take the core barrel off, put your bit back on and then you go back on bottom and resume drilling.

That is an—or can you give us an estimate of the approximate length of time it takes you to do that operation?

Mr. Aadnesen: Object to it on the basis he said this was not done. It is immaterial.

The Court: I don't see the materiality of it, it wasn't done.

Mr. Coughlan: It was requested and that was our point. [58]

The Court: Yes, I understand that.

Q. What geological phase of the well drilling operation directly connected with the mechanical phase?

Mr. Aadnesen: Objected to as calling for an answer from this witness who is not qualified.

The Court: He may answer if he can.

A. I would say you would have to respect the geologist, yes.

Q. And in the event there are oil shows during the drilling operation do you rely upon the geologist in any way?

Mr. Aadnesen: Object to that as indefinite as to time and calling for a conclusion.

The Court: Objection sustained.

Q. Did you rely upon Mr. McIntyre in the drill-

(Testimony of Edwin W. Windolph.)

ing of this well so far as the geological phase was concerned? A. Yes.

Q. Did you have any oil showings at any time during the time you were drilling the well and Mr. McIntyre was present? A. Yes.

Q. What was the procedure followed then, what was done?

A. Additional samples probably would be taken.

Q. I mean what was done?

A. Yes, additional samples were taken, and two or three [59] times why we would or did come off the bottom and circulate for additional samples.

Q. And was that pursuant to Mr. McIntyre's instructions? A. Twice, yes.

Q. Twice? A. Yes.

Q. Are you familiar with the term used in oil well drilling operations as a "turn key" job?

A. Yes, there is.

Q. What type of operation is that?

A. Turn key——

Mr. Aadnesen: Object to that as immaterial and no foundation for that.

The Court: Objection overruled.

A. A turn key is generally referred to as you have the acreage, we drill the well complete. The drilling—everything that is connected with it and completion. In other words, everything connected with that well from one end to the other including the geological phase of it. We furnish that also. We turn the well over to you complete.

Q. Is that including third-party services, too?

(Testimony of Edwin W. Windolph.)

A. All services.

Q. Now was this job in Bear Lake County we are now talking about; was that a turn key job?

A. No.

Q. Why was it not? How did that job differ from a turn key job? [60]

Mr. Aadnesen: Objected to as immaterial if it wasn't a turn key job.

The Court: Objection sustained.

Q. Do you know whether Mr. McIntyre, the Shell geologist, was present at the time of the accident? A. Yes, he was.

Cross-Examination

By Mr. Aadnesen:

Q. As I understand your testimony, you weren't present at the time of this accident; is that right?

A. I was there immediately after it happened.

Q. But you were not present at the time the accident happened? A. That is right.

Q. And as I understand your previous testimony, Mr. McIntyre contacted you in the hotel the night before? A. Yes, sir.

Q. So far as you know he had never been to that rig? A. That is right.

Q. Now your testimony now that he was present is based upon something else than your actual knowledge, isn't it?

A. Well, he was there when I drove up.

Q. In answer to a question you used the word

(Testimony of Edwin W. Windolph.)

"instructions" so far as it relates to a geologist; is that not more correctly put "requests"?

A. Ask it again please. [61]

Q. In other words, you received no instructions, did you, from the geologist; you received requests; is that right?

A. Yes, I imagine that is about right, yes.

Q. It is your understanding, is it not, that so far as this particular job was concerned Mr. McIntyre had no authority over you in the drilling of that well? A. That is right.

Q. When you used the statement you relied upon the geologist isn't it true you meant by that that you expected he would collect his samples and analyze them? A. Yes, and inform us.

Q. So far as the drilling of that well was concerned, the mechanical aspect of it, and the actual drilling of that well, that was your responsibility; wasn't it? A. Yes.

Q. And you were the supervisor and had complete control and authority? A. Yes.

Q. Was there ever any production received from that well? A. No.

Q. You mentioned the fact they had been broken down several times; it is true, isn't it, you were broken down at the time you related that the accident happened and prior to when Mr. McIntyre arrived in town?

A. Yes, I think it was a parted universal [62] joint.

(Testimony of Edwin W. Windolph.)

Q. Now is it also true you had drilled some prior to that time?

A. I think we drilled from 960 feet to 1010 feet or something like that—1009 feet.

Q. Now the well had been drilled to 900 feet; is that right? A. 960 feet, yes.

Q. And then you put the rotary rig on; is that right? A. Yes.

Q. And you drilled it down to a thousand and something?

A. Yes. I don't recall exactly what it was.

Q. You did that some time the middle of May?

A. We were at that before June 1st.

Q. Before June 1st; is that right?

A. Yes.

Q. And that was prior to the time this accident happened? A. Yes.

Q. And there wasn't any geologist on that job at that time, was there? A. That is right.

Q. Now you stated you talked to Mr. Gamble and said something about you were waiting for a geologist to arrive, you didn't wait, did you?

A. No. [63]

Q. Did you have a geologist on that job before?

A. Lloyd Gray was the geologist on this before with the cable.

Q. Who was Lloyd Gray?

A. He was President of the Rocky Mountain Oil Corporation at that time.

Q. He was there as I understand it before until that well was drilled to a depth of 900 some odd

(Testimony of Edwin W. Windolph.)

feet? A. He was supposed to be, yes.

Q. Do you know where he went?

A. At what time?

Q. Well, do you know when he left the job?

A. No, I do not remember the dates, no.

Q. Do you know of your own knowledge why he left?

A. Mr. John McIntyre and myself went to location and terminated the operation of the cable tool units.

Q. At that time was the time you stated you called Mr. Gamble; was that a request for a geologist?

A. I stated to Mr. Gamble that we would be ready to drill on such and such a day if nothing unforeseen happened.

Q. Isn't it a fact you and Mr. McIntyre requested that Shell send a geologist?

A. Repeat that question.

Q. Isn't it a fact that you and Mr. McIntyre, that is John McIntyre, president of Rocky Mountain Oil, requested [64] that a geologist be sent?

A. Not myself, Mr. McIntyre did.

Q. That was a request, wasn't it?

A. It was a request so far as I was concerned.

Q. Now were you present when any of the cable tool drilling was done? A. I was there twice.

Q. Do you have any information of your own whether samples were collected?

A. Yes, samples were collected.

Q. And that was by this Mr. Gray?

(Testimony of Edwin W. Windolph.)

A. By the drilling crew.

Q. By the drilling crew? A. Yes.

Q. And then turned over to Mr. Gray?

A. I presume so, yes.

Q. And when you were drilling subsequent to the accident, that was the way this procedure happened also, wasn't it; your crew collected these samples? A. Yes.

Q. And then turned them over to the geologist?

A. That is right.

Q. Do you remember seeing Mr. Prestidge and Mr. Wuthrick at the hotel?

A. Yes, on the night before the fire. [65]

Q. And do you recall who was present?

A. Myself and the two boys.

Q. And was Mr. Robinson there? A. No.

Q. Did you speak with these two gentlemen?

A. They asked me for employment.

Q. What did you tell them?

A. I told them Clarence would be in at nine o'clock and that he would give them the information necessary, but that they were not to go out to location unless they had his permission.

Q. Did you subsequently see them again?

A. No.

Q. Did you at any time forbid them to go to that rig?

A. I told them that night not to go unless they had permission from Clarence.

Q. When these requests were made that you

(Testimony of Edwin W. Windolph.)

have talked about, so far as geology was concerned was there a purpose for your complying with them?

A. Only so far as the instructions from John J. McIntyre were concerned.

Q. You were well acquainted and talked with Mr. McIntyre in regard to the drilling of this well?

A. Which McIntyre?

Q. John J. McIntyre. A. Yes, sir. [66]

Q. Now Mr. John J. McIntyre is the president of Rocky Mountain Oil? A. Yes, sir.

Q. Mr. Loren McIntyre is the gentleman that is the geologist; I am now talking about John J. McIntyre. It is a fact, isn't it, that if you or Mr. McIntype didn't desire to, you had no necessity to comply with any requests of this geologist; isn't that true? Isn't that as you understood it?

Mr. Coughlan: I object as it is immaterial as to what he understood, and calls for a conclusion.

The Court: Objection sustained. He can tell what he did.

Redirect Examination

By Mr. Coughlan:

Q. Did you see a Shell geologist on this job prior to the time that Mr. McIntyre came there?

A. There was a man that picked up samples at one time at the cable tool operation and I would surmise he was a geologist, although not certain.

Q. Was he connected with Shell?

Mr. Aadnesen: I object to that.

Q. If you know?

(Testimony of Edwin W. Windolph.)

The Court: He may answer.

A. Yes, I would presume so.

Mr. Aadnesen: I request on the basis of that answer that it be stricken. [67]

The Court: Yes, answer the question whether he was or wasn't. The answer may be stricken. You cannot presume or guess.

Q. Do you know whether or not there was some employee or officer or someone connected with Shell Oil Company on the premises prior to the time Mr. McIntyre came? A. I don't know.

Q. Did you have any authority over the geological phase of this well? A. None whatsoever.

Q. And did you have any authority over Mr. McIntyre, the geologist? A. No.

Mr. Aadnesen: No questions.

(Whereupon, a short recess was taken.) [68]

3:00 P.M.

LANUS W. PRESTIDGE

the plaintiff herein, duly recalled, testified as follows upon

Direct Examination

By Mr. Coughlan:

Q. Did you talk to Mr. Robinson after you had talked to Mr. Windolph at the "Burgoyne" Hotel?

A. Yes, I did.

Q. And what did Mr. Robinson tell you?

A. He said at the time being that the rig was broke down and for us to come out to the rig early

(Testimony of Lanus W. Prestidge.)

the next morning, and that if they had everything under way they would see about putting us to work.

Q. Did you go out then pursuant to that?

A. Yes, I did.

Mr. Coughlan: That's all.

Mr. Aadnesen: No questions. [69]

Mr. Coughlan: At this time we would like the deposition of Dr. Rulon B. Lindsay published. Doctor Lindsay is not present.

The Court: It may be published.

Mr. Coughlan: This is the deposition of Dr. Rulon B. Lindsay taken by the plaintiff at Montpelier, Idaho, on Saturday, May 19, 1956, pursuant to notice. Mr. Coughlan was present, appearing for the plaintiff. Mr. Marcus appeared for the defendant. The testimony of Dr. Lindsay should be considered to the same effect as if he were present and testified personally. [70]

(Following deposition of Dr. Rulon B. Lindsay was read.)

"DOCTOR RULON B. LINDSAY

called as a witness by and on behalf of the plaintiff, was by me first duly sworn to tell the truth, the whole truth, and nothing but the truth, after which the said witness testified and deposed as follows:

Direct Examination

By Mr. Coughlan:

Q. Will you state your name, please, Doctor?

A. Rulon B. Lindsay.

(Deposition of Rulon B. Lindsay.)

Q. And where do you reside?

A. Montpelier, Idaho.

Q. What is your profession?

A. Physician and surgeon.

Q. And are you a graduate of a recognized medical school? A. I am.

Q. Of which school is that?

A. Northwestern University.

Q. When did you graduate, Doctor?

A. In 1932.

Q. And are you licensed to practice your profession in the state of Idaho?

A. Yes; I am. [71]

Q. And how long have you been practicing your profession, Doctor?

A. Oh, about twenty-four years—since 1932.

Q. And you are in the general practice?

A. Yes.

Q. Do you have occasion to treat burns in connection with your practice? A. I do.

Q. Doctor, do you know Mr. Lanus Wayne Prestidge? A. Yes; I do.

Q. And did you have occasion to attend him on or about the 2nd day of June, 1954?

A. Yes, I did.

Q. And what was that occasion?

A. That was when he was brought to the Bear Lake Memorial Hospital with extensive burns.

Q. Doctor, will you just detail what his condition was, as to the extent of burns, and so forth?

A. Well, he had severe burns of the first, second

(Deposition of Rulon B. Lindsay.)

and third degrees, over the face, neck, forearms and legs and ankles—from the hips down.

Q. Did you say his hands and face were also burned, Doctor? A. Yes, sir.

Q. And what treatment did you afford him then, Doctor?

A. Well, the immediate treatment was treatment for [72] shock. The first thing we did was to administer opiates and get him in bed, get him wrapped in anesthetic and antibiotic ointments, with pressure bandages, and supply him with body fluids by the intravenous method.

Q. Now, Doctor, did the subsequent treatment necessitate the changing of these bandages?

A. Yes.

Q. And what is involved in that procedure?

A. Well, these bandages had to be removed from all burned surfaces, and of course they are—after they have been on several days they adhere a lot and cause a lot of pain in removing them.

Q. And is it necessary to administer opiates before you can follow that procedure?

A. Yes, each time we had to administer opiate prior to changing the dressings.

Q. And, Doctor, could you tell us what is involved in cleaning up areas after a burn of that kind? What was involved in this case?

A. Gradually, as you can determine the extent of the burns, and the tissue that is dead, it is the process of removing the dead tissue and finding out how much live tissue there is, and if there is enough

(Deposition of Rulon B. Lindsay.)

to not necessitate skin grafting, or whether a continuity of the skin can be restored without the grafting. [73]

Q. Doctor, what can you tell us about pain so far as Mr. Prestidge was concerned?

A. He had a lot of pain; in fact, there was very shocking pain the first ten days, and then a severe lot of pain over a period of three weeks to a month.

Q. Doctor, will you explain the appearance of the burned areas?

A. Well, when he first came in there were huge blisters over the entire burned surfaces, and, of course, the watery serum underneath.

Q. And what about the skin—what happened to the skin on the burned areas, Doctor?

A. That on second dressing, after we had the shock relieved some, this skin was all removed so that we could apply the dressings directly to the burned areas of the lower layers.

Q. Did that extend down then so you could observe the muscles and blood vessels in his arms and legs?"

Mr. Marcus: To which we object as leading.

Mr. Coughlan: I will withdraw the question.

"Q. (Mr. Coughland, continuing): What could you observe then on the man after his skin came off?

A. Well, as time went on, and after a period of six weeks, we would see what tissue was dead, and of course that was removed, or it sloughed off, and

(Deposition of Rulon B. Lindsay.)

it was down to the muscles [74] and blood vessels in most of the areas of the legs that were burned.

Q. And are the body fluids involved—were they involved in this case, Doctor?

A. Yes. Any time you have a burn, naturally the lymphatics that supply your serum under the layer of skin, to protect the body from pain, and of course, you lose a lot of body serum that way, and that is a constant loss during the time he is healing.

Q. And was shock involved in Mr. Prestidge's case?

A. Yes, it was an important factor the first ten days.

Q. And what did you do with respect to replacing the fluid, Doctor?

A. Well, the way we replaced it, the necessary procedure is to give him fluids in the form of glucose and normal saline intravenously.

Q. And, Doctor, do you recall how long Mr. Prestidge was in the hospital?

A. I think I discharged him about July 15th. That was from June 2nd to July 15th.

Q. And was he under your treatment during all of that time? A. Yes, sir.

Q. And then did you attend him subsequent to the time he left the hospital?

A. Yes, I attended—was in contact with him for three [75] or three and one-half months following his release.

Q. And, Doctor, what, if any, permanent effect does Mr. Prestidge have as a result of these burns?

(Deposition of Rulon B. Lindsay.)

A. Well, he has a lot of scars and contracture that limits the degree of motion and the activities of his lower extremities.

Q. What is the effect on the nerves, Doctor?

A. Well, the nerves in this scar tissue and contracture areas are less sensitive and are more subject to damage because of lack of normal reflexes in the body's protective mechanism, both from the standpoint of accident, and from the standpoint of heat or cold injury.

Q. And what is the effect, Doctor, in the event of reinjury of these areas?

A. In case they are reinjured the healing process would be impaired considerably because in scar tissue the blood supply is limited and the healing is retarded.

Q. And what about the sensitivity of the areas, Doctor?

A. It is much less sensitive than normal tissue, normal skin.

Q. And does that have some effect on reinjury?

A. Yes, especially in the case of being frost bitten, or other burns. They are not sensitive; they may unconsciously be burned or frozen without realizing the temperature change is that great. [76]

Q. Doctor, was there some blood loss involved so far as Mr. Prestidge was concerned?

A. No, I don't believe there was any appreciable loss changing the dressings. Each time, of course, there was some blood loss. I think the main loss of

(Deposition of Rulon B. Lindsay.)

blood was not in whole blood but mainly in blood plasma.

Q. And that is the fluid, I presume, that you mentioned? A. The fluids; yes, sir.

Q. Doctor, is there a factor of fear, so far as the patient is concerned, in extensive burns? Does that enter into the apprehension?

A. Yes, severe shock—with severe shock there is always severe apprehension.

Q. And, Doctor, was it necessary for Mr. Prestidge to remain in one position while these burns were healing?

A. Yes, it was impossible for him to move and change positions without actually being lifted and turned by the aid of the nurses and help.

Q. And that, I presume, is a factor in a patient's discomfort, isn't it, Doctor? A. Yes, sir.

Q. Doctor, the effect of the burns on Mr. Prestidge—and you say this will be permanent or of a permanent nature?

A. Yes, that will be permanent.

Q. And, Doctor, you would not expect then any improvement over the time you saw him? [77]

"Mr. Marcus: That is objected to as being leading and suggestive."

"Q. (Mr. Coughlan, continuing): Doctor, would you say—what would you say as to Mr. Prestidge's prognosis?

A. Well, I observed him over a period altogether, during his stay and after he was discharged from the hospital of approximately six months, and

(Deposition of Rulon B. Lindsay.)

I believe the full extent of improvement, and the feeling, had at that time come to a standstill, and no more improvement could be expected.

Q. And what would you say, Doctor, as to whether or not he suffers from disability as a result of the burns?

A. I think that he does suffer from considerable disability due to the fact that the blood supply in the legs is impaired. Also the motion and movement from all activity or labor where lag work is necessitated, I think it would be much impaired, in his ability to carry out these activities.

Q. And how long would that continue, Doctor?

A. Well, I think that condition is permanent. I don't think that will change or improve any.

Cross-Examination

By Mr. Marcus:

Q. Were you acquainted with Mr. Prestidge prior to the time you treated him, Doctor?

A. No; that was the first time I had ever come in contact [78] with him.

Q. You had never treated him before?

A. No; I didn't even know him.

Q. Was he coherent at the time he was brought to you the first occasion after the accident?

A. He was extremely hysterical and unable to co-operate in any way in aiding and allowing us to treat him, or anything. We just had to go ahead and take care of him.

(Deposition of Rulon B. Lindsay.)

Q. Did he give you a history of how the injury had occurred?

A. All he said was that he was burned with burning oil, and that is all he told us at the time.

Q. Later, Doctor, did he say anything about for whom he was working at the time of this occurrence?

A. Yes, later he gave a history of where he was, and what had happened. He stated that——"

Mr. Coughlan: I object to that. I believe you have answered that, Doctor. I will have to object to that question as to employment, or whether there was any employment at all, on the ground it is not proper cross-examination; not covered on direct examination.

The Court: Read the question.

(Pending question read.)

The Court: He may answer if he knows. [79]

"A. He said that he had reported that morning to the oil drilling company. Of course, I didn't know at the time what oil drilling company it was—that he had reported for work, and while they were waiting for the foreman to come that they were trying to keep warm with a fire that was built there, and the fire had gone down, and somebody picked up a can of fuel oil and threw some on the fire, and it exploded and covered him with oil. And that was the history he gave as to how it happened.

Q. Did he later tell you what company he was working for, or had reported to work for?

(Deposition of Rulon B. Lindsay.)

A. Well, I think he called it the Rocky Mountain Drilling Company.

Q. Was it the Rocky Mountain Oil Corporation?

A. As near as I know. I can look at my records, because I had to get that history from him, and that is the Rocky Mountain Drilling Company (Great Western Petroleum Company).

Q. Doctor, will you refer to your entire file on Mr. Prestidge? Do you have your entire file on him?

A. I have my records. I don't have my hospital records here. They are in the hospital.

Q. May I take a look at those for just a minute?

A. Yes. (Hands papers to Mr. Marcus.)

Q. And, Doctor, these instruments you have handed me are reports you made, or notes, or copies of reports in [80] connection with Mr. Prestidge's treatment? A. Yes, sir.

Mr. Marcus: Could I have these marked for identification, please?"

The Court: Are they marked as one exhibit?

Mr. Marcus: Yes.

"Q. Doctor Lindsay, referring to Defendant's Exhibit No. 1 (now marked Defendant's Exhibit 6), so marked for identification, would you go through those instruments and just tell what they are so that the Reporter can get it down?

Mr. Coughlan: Just a moment, Doctor. I will object to this, but first, I want to ask a question: Doctor, are these your office records, your own office records?

(Deposition of Rulon B. Lindsay.)

A. These are copies. There are three papers here that are copies of reports.

Mr. Coughlan: But they are your own records?

A. Yes, sir.

Mr. Coughlan: For the purpose of the record we will object to any attempt by the defendant to introduce the doctor's own records, on the ground they are privileged; that it is not proper cross-examination, and the doctor is present to testify. I think that is all of the objection."

The Court: What have you to say about [81] that?

Mr. Marcus: By reason of taking the deposition I believe the privileged part of it is removed.

The Court: I am going to reserve my ruling on that.

"Q. (Mr. Marcus, continuing): Now, Doctor, could you tell the Reporter what those instruments are, from the top to the bottom?

Mr. Coughlan: And we further object to this upon the ground that the instruments, if admitted, are not the best evidence. Now, go ahead, Doctor."

Mr. Zener: Your Honor, there is an answer after that objection.

The Court: You mean the rest of it follows with respect to the exhibits?

Mr. Zener: Yes, apparently so.

Mr. Marcus: Next is the answer by the Doctor identifying these exhibits.

The Court: I am going to exclude the exhibits for the time being unless I can be shown some

(Deposition of Rulon B. Lindsay.)

authority for getting them in. The Doctor is being questioned about what happened.

Mr. Marcus: We point out that on direct the Doctor had been referring to these instruments, and therefore I think we would be entitled to have them put into evidence. They are the best evidence, [82] of course.

The Court: You can cross-examine him on anything he referred to but they are his notes.

Objection sustained.

Mr. Marcus: The next questions and answers pertain to those exhibits and I presume they should be omitted by the ruling.

The Court: Yes, that is right.

Mr. Marcus: I don't know whether those questions and answers contained the submission of those in evidence but later on we did submit them in evidence and may it be considered here. We submit them.

The Court: You are offering them?

Mr. Marcus: Yes.

The Court: Very well, the objection will be sustained.

Mr. Marcus: On page 18 would be the next pertinent part, starting with this question:

"Q. (Mr. Marcus, continuing): Doctor, these are the notes you were referring to in your direct examination, are they? A. Yes, sir.

Q. Did Mr. Prestidge tell you what his occupation had been prior to the time of this accident?

(Deposition of Rulon B. Lindsay.)

A. No, I don't believe he did. I don't recall at this time. [83]

Q. Was he a married man, Doctor Lindsay?

A. No, sir; he was single at that time.

Q. And, as a matter of fact, wasn't it—didn't the accident occur on June first, instead of on June second.

A. Yes. In referring to my notes I have it June first.

Q. No other physician treated Mr. Prestidge before his treatment by you? A. No.

Q. Now, Doctor, in your report you indicated that he was progressing satisfactorily under your treatment until he was discharged?

A. Yes, I think we could say for that type of case that he progressed as well as could be expected.

Q. Generally speaking you had a good recovery in the treatment of him?

A. Yes, as good as we could expect under the degree of injury.

Q. And when he was released was he able to walk without the use of crutches or a cane, Doctor Lindsay?

A. Yes, we was able to walk on a level floor, or ground, without the aid of a cane or anything.

Q. And he was released some time in July?

A. Yes, I think it was the fifteenth of July.

Q. Had he been walking around in the hospital prior to the time you released him? [84]

A. He had for, I think, about one week.

(Deposition of Rulon B. Lindsay.)

Q. When did you next see him after he was released from the hospital?

A. Well, I haven't that down here in these particular records, but I saw him once or twice a week—never less than once a week—for the next three and one-half months.

Q. Two and a half months, did you say?

A. Two and a half months.

Q. And at the end of that time he was entirely released from your care, was he, Doctor Lindsay?

A. Yes, as what we call surgically cured.

Q. After that period of time you considered him surgically healed? A. Yes, sir.

Q. And did he remain here in Montpelier?

A. I don't believe he did, after that time. I think he left.

Q. Do you know whether he did any work after you released him?

A. I don't know. I have no direct knowledge that he did.

Q. And would you have considered that he was not able to carry on gainful employment in a job that required him to be on his feet very much of the time, at the time you considered him surgically healed? [85]

A. I would consider that if he had to do much walking that he wouldn't be able to carry on the duties of a job, if he would have had to do that. He might stand and be able to do some work without too much exertion walking.

(Deposition of Rulon B. Lindsay.)

Q. What work has be been doing since that time? Do you know?

A. The only thing is—and this is hearsay—that he tended bar a little while, and that is the only employment that I know he has had.

Q. Had he also been a bartender prior to this occurrence?

A. I don't know what his occupation was.

Q. And you say, Doctor, because of the effect these injuries had on the skin, he would be less sensitive to pain, or sensation?

A. Less sensitive to sensation.

Q. Was he crippled in any way by reason of nerve injuries?

A. Yes—well, that is a rather difficult question to answer straight out. I think there was some disability due to nerve injury.

Q. What I am getting at is: Did he drag his leg, or was his leg numb, so he couldn't use it without crutches or some other assistance?

A. Not from a nerve standpoint, I wouldn't say.

Q. And did you prescribe exercises or any kind of self-treatment that you would consider proper to improve this condition? [86]

A. Oh, yes. I prescribed and recommended massage of the scar areas with oils.

Q. And did you urge him to continue that kind of treatment after his release by you?

A. Oh, yes; I advised him to.

Q. Has he ever paid you the doctor bill that he owed you? A. No.

(Deposition of Rulon B. Lindsay.)

Q. He didn't? A. No.

Mr. Marcus: I believe that is all.

Redirect Examination

By Mr. Coughlan:

Q. Doctor, have you ever been paid your bill by anyone at all? A. No; I never have.

Q. That bill is still due and owing?

A. Yes.

Q. Now, didn't your last report, dated July 7th of 1954, indicate as to permanent disability, "not likely,"——

Mr. Marcus: Mr. Coughlan, are you referring to a portion of what has been submitted here as Defendant's Exhibit No. 1 (now 6) for identification?

Mr. Coughlan: Yes.

Q. (Mr. Coughlan, continuing): You saw Mr. Prestidge after that time, did you not, for several months? [87] A. Yes.

Q. And your testimony as to disability is based upon the last time you saw him, is it not?

A. Yes, sir.

Mr. Coughlan: I believe that is all.

Mr. Marcus: That is all."

Mr. Marcus: Your Honor, we would like to resubmit the exhibits in light of the subsequent examination and testimony of the Doctor and the questions asked by Mr. Coughlan.

The Court: Of course, he didn't know the objec-

tion was going to be sustained. Ladies and gentlemen, we will recess until tomorrow morning at 9:30 a.m. [88]

May 25, 1956

LOREN McINTYRE

having been first duly sworn, testified as follows, upon

Direct Examination

By Mr. Zener:

Q. Will you state your name, please?

A. Loren McIntyre.

Q. Where do you reside?

A. Grand Junction, Colorado.

Q. What is your present employment?

A. Geologist.

Q. How long have you been a geologist?

A. About three and a half years.

Q. By what company are you employed?

A. Shell Oil Company.

Q. Have you been employed by them for the three and a half years you have mentioned?

A. Yes, sir, I have.

Q. Then you were a geologist for the Shell Oil Company in the months of May, June, July of 1954?

A. That is correct.

Q. Are you acquainted with what has been called the Give Out Antecline located in Bear Lake County, Idaho? [89]

A. I am acquainted with that area.

Q. When did you first make your acquaintance

(Testimony of Loren McIntyre.)

with that area? A. On or about May 30th.

Q. Is that the land or a portion of the land where certain drilling operations were conducted by Rocky Mountain Oil Corporation in 1954?

A. It is.

Q. Had you any knowledge of this area geologically prior to your visiting the area in person?

A. No.

Q. Had you made any study of the geology of that area? A. No.

Q. Prior to that time? A. No.

Q. Had you seen any geological data? That is any geological data compiled on this area before you visited the area?

A. I am not aware of any.

Q. When you came there you had no knowledge of the geology of the area you were visiting; is that right? A. That is right.

Q. Nobody had ever discussed the particular area with you or its geology? [90]

A. It was quite likely discussed. I don't recall seeing any maps or anything on the area.

Q. When you say it was quite likely discussed, was it discussed by you with any of your superiors or co-workers in Shell Oil Company before coming to the area? A. Yes.

Q. What generallly was the information that you gained about the area from those discussions?

A. Just the type of rock we could expect there.

Q. Did you examine any maps or surveys or previous studies that had been made on the area?

(Testimony of Loren McIntyre.)

A. No.

Q. By whom were you sent to this area?

A. Mr. Kirby.

Q. Who is Mr. Kirby?

A. District Geologist for the Grand Junction District, Shell Oil Company.

Q. Did he give you any instructions as to what you were to do when you arrived in that area?

A. Yes, he did.

Q. What were they?

A. I was to collect the samples and geological data and transfer it to him.

Q. Montpelier, Idaho, is one of the towns in Bear Lake County; is it not?

A. Yes, it is. [91]

Q. When did you arrive at Montpelier?

A. May 30th.

Q. Did you contact anyone in connection with this drilling on the occasion of your first arrival?

A. No, I did not.

Q. Did you visit the area in which the drilling was being conducted?

A. Yes, visited the locality, yes.

Q. Did you go up to the drilling site?

A. Yes, I did.

Q. And on what day was that?

A. Evening of May 30th.

Q. Was there anyone up there or any drilling going on at the time? A. There was not.

Q. Did you become acquainted with Mr. Wuthrick? A. No, I did not.

(Testimony of Loren McIntyre.)

Q. At any time during your visit there at the drilling site?

A. I was at the site at the same time he was but I did not become acquainted with him.

Q. Did you make the acquaintance of the drilling crew who were conducting the drilling operations there?

A. Speaking acquaintance, yes.

Q. Who were those persons that you met? [92]

A. I met Mr. Robinson and Mr. Windolph, and the majority of the rest of the persons I don't know their names.

Q. Do you know their connection with the drilling?

A. Well, I couldn't tell their connection, no. I believe Mr. Windolph was the drilling superintendent and Mr. Robinson the tool pusher.

Q. Did you have any contact with Mr. Windolph following your first visit to this well site?

A. On the evening of May 31st I met Mr. Windolph the first time.

Q. Where did you meet him?

A. At the hotel in Montpelier.

Q. What, if anything, did you discuss with him at that time?

A. Just generally talked and he did show me some samples that they had at the depth they were at this time.

Q. You discussed the well drilling operation out there, I take it?

(Testimony of Loren McIntyre.)

A. I don't think we discussed the actual operation, no.

Q. Did you discuss anything about the depth of the well?

A. Yes, I probably asked him what the depth was.

Q. Did you discuss anything about the geological formations that had been encountered? [93]

A. No, he had the sample there.

Q. Did he furnish you with a sample?

A. Yes.

Q. And did you make an examination of it?

A. Yes, I did.

Q. Did you report the result of that examination to your employer, Shell Oil Company?

A. I did.

Q. When did you do that?

A. I did that the following morning.

Q. What was the next occasion for your visiting this well site? A. June 1st.

Q. And about what time did you arrive at the well site?

A. About six in the morning, I guess.

Q. Were there persons present there at that time? A. Yes, there were.

Q. Could you name those that you recall at this time?

A. There was Mr. Doman and Mr. Robinson was asleep in a truck, and a person they call "Shorty."

Q. Do you recall seeing Mr. Prestidge there, the gentleman who is the plaintiff here?

(Testimony of Loren McIntyre.)

A. Yes, he came in later after I did.

Q. Were you present at the site at the time the accident [94] or incident happened that Mr. Prestidge testified about? A. Yes, I was.

Mr. Marcus: Object to these questions as improper examination of an adverse witness.

The Court: Objection overruled. He can ask him anything he wants to about it.

Q. Following this incident you remained there as a geologist; is that right?

A. Yes, until about July 1st.

Q. And how frequent did you visit the drilling site?

Mr. Marcus: May I ask a question in aid of an objection?

The Court: Yes.

Mr. Marcus: Does this relate to periods of time subsequent to the date of this occurrence, Mr. Zener?

Mr. Zener: Yes.

Mr. Marcus: Object on the grounds it is incompetent.

The Court: Objection overruled.

(Reporter read the following question as requested, "Q. Were you present at the site at the time the accident or incident happened that Mr. Prestidge testified about?")

A. About once or twice a day. [95]

Q. And would those visits be of all hours of the day and night or occasionally?

(Testimony of Loren McIntyre.)

A. No, they would not.

Q. What was your purpose in visiting the site on those occasions?

A. Just to pick up samples.

Q. Did you pick up samples at the well site?

A. Yes, I did.

Q. Who furnished those samples to you?

A. Rocky Mountain Oil Company.

Q. Will you tell the jury how you picked up the samples and how they were handled by you?

A. The samples were collected in small canvas bags and usually stacked by the house or out by the ground there, and I would just drive out and pick them up.

Q. What can you tell the jury is the purpose of collecting these samples in the process of the drilling of this well?

A. To look for oil showings and to examine the geology.

Q. And that was your function to determine if there were oil showings and to make certain geological conclusions from the examination of these samples; is that right? A. That is correct.

Q. And you did that of course when you collected samples—you examined them? [96]

A. I examined them after I took them back to the motel, yes.

Q. Did you report as to what you found from the samples?

A. I reported, yes, to Grand Junction.

Q. That is your employer, Shell Oil?

(Testimony of Loren McIntyre.)

A. Yes, that is right.

Q. You sent those reports in regularly after making examinations of the samples?

A. Yes, sent those reports in once a day.

Q. Did you also send the samples or simply the report of your findings on them?

A. I sent the samples at a later date when we had collected enough for shipment to Salt Lake.

Q. Do you know at whose request you were sent to this drilling site?

A. I was sent at the request of my immediate superior, Mr. Kirby.

Q. Do you know whether any request was made by Rocky Mountain Company to have you sent there? A. Not definitely.

Q. What do you mean by that?

A. I believe there was a telephone call, but I didn't take the call so I don't know who it was about for sure.

Q. Were you advised that your presence or the presence of some geologist had been requested to be in attendance at this drill site? [97]

A. I was only told to report to the drill site.

Q. Before you reported there did you know the company that was engaged in the drilling?

A. I knew the name, yes.

Q. Did you know any of the personnel?

A. No, I didn't.

Q. You acquired that information from your employer, I take it? A. Yes.

Q. Do you know whether or not prior to your

(Testimony of Loren McIntyre.)

being at this drill site if there had been any other geologist from your company at the well site?

A. To the best of my knowledge there had not.

Q. Do you know positively whether that was the case or not?

A. No, I didn't—I mean I do not.

Q. As I understand your testimony you came to this well site for the purpose of doing the geological work you have outlined without any previous knowledge of the geology of this county or the preliminary geological work that may have been done in the area; is that right? A. That is correct.

Q. You knew nothing whatever about the geology of this area except what you gained after you got there as a geologist for Shell Oil [98] Company?

A. I was informed as to the formations we could expect to encounter, yes.

Q. And who informed you of that?

A. Mr. Kirby.

Q. And he was your immediate superior?

A. Yes; that is right.

Q. Do you know from what source Mr. Kirby obtained his information in regard to the geology of this area?

Mr. Marcus: May it be understood our objection runs to all the testimony here on the ground it is incompetent, immaterial and irrelevant.

The Court: Yes.

A. I do not.

Q. You do not know of your own knowledge of

(Testimony of Loren McIntyre.)

any geological work having been done in that area then? A. I do not.

Q. Now isn't it a fact, Mr. McIntyre, that the Shell Oil Company held oil rights to considerable area immediately surrounding this particular well site?

A. I have nothing to do with the land rights, I would not know.

Q. Isn't it a fact that Shell Oil Company held leasing rights or oil rights and considerable land immediately surrounding this area?

A. I would not know. [99]

Q. You did not know then and you to not know now that they had interests in that area?

A. I could not say for a certainty. I could give a belief on it.

Q. What is your belief on it?

A. I believe that they probably did hold some interests in that area.

Q. As a matter of fact, you knew they held substantial acreages immediate adjacent to this drilling site? A. No, I did not know.

Q. You don't know that either now, do you?

A. No, I don't.

Q. What was the benefit to your company of the geological work and determinations that you made at this particular well site?

Mr. Marcus: We object to that as calling for a conclusion of this witness. He is simply a geologist. He isn't in a position of management for this company.

(Testimony of Loren McIntyre.)

The Court: He may answer.

A. Well, there would be some value of the entire area and region of that country in the geological aspects, and of course if it was a producing well it would show that region of Idaho as an oil province.

Q. When you say it would be of some values, what particular values do you have in mind? [100]

A. Of a geological nature.

Q. Isn't it a fact that the geological findings and determinations you could make from examining the samples of this well would be indicative of the type of geology and the likelihood of oil for the entire area?

A. We would hope it would be indicative of the geologly and the likelihood of oil I could not answer.

Q. Well, your geological studies are made for the purpose of determining whether there is a possibility or probability of oil being there?

A. A possibility, yes.

Q. And depending upon those you formulate opinions as to the value of the field as prospective oil producing area; isn't that a fact?

A. That could be, yes.

Q. Well, why do you have a geologist examine these samples?

Mr. Marcus: We renew our objection to this questions. The purpose of this drilling was to obtain the samples and that is obvious.

The Court: Let the witness answer. He may answer that question.

(Testimony of Loren McIntyre.)

A. Is this a general question or just on this one well?

Q. I am talking about this particular well.

A. We were looking for the nugget [101] sandstone.

Q. Did that sandstone have some significance with respect to the presence of oil in the area?

A. It is producing of oil bearing samples in Wyoming, never been produced in Idaho.

Q. Its presence if you should find it there is indicative of the presence of oil; is that geologically correct? A. No, it is not.

Q. Then what is the significance of the finding of this particular sandstone?

A. It could possibly be a reservoir rock.

Q. What do you mean by that?

A. Have the adequate base to contain oil or fluid of some type.

Q. You were doing geology in this area and on this particular well for the purpose of determining its value for oil only, weren't you, or gas?

A. Well, I was not doing the geology in that area. On this particular well I was looking for the sandstone and if it had oil shows I would attempt to give some valuation to it, yes.

Q. Were there some oil showing found in this well during the time you were there?

A. Yes, there were.

Q. And on those occasions did you make requests or did you ask the operators of this well to furnish you with [102] samples?

(Testimony of Loren McIntyre.)

A. I requested that if possible they could give us samples, yes.

Q. When these showings were encountered what procedure was taken on your requests?

A. On oil showings we would ask them to come off bottom and circulate up the samples so we could evaluate the samples.

Q. Was that done on more than one occasion while you were there?

A. I can't recall the exact number. It would be one or two times, yes.

Q. When you made those requests they were complied with, were they, by the persons in charge of the drilling? A. Yes, they were.

Q. I take it you made these requests for circulating the well and bringing up the samples because of certain conclusions you had reached from reading or examining the samples that had previously been furnished to you; is that correct?

A. If the samples had oil showings I would generally ask them to circulate the samples.

Q. And that is what you did on the occasions here at this well? A. Yes. [103]

Q. To whom did you communicate the information that you gathered from having the well circulated and the samples taken from time to time?

A. Mr. Kirby.

Q. Did you communicate that information to anyone else?

A. I was free to communicate it to Rocky Mountain if they requested it.

(Testimony of Loren McIntyre.)

Q. Did they request it?

A. They were just waiting for oil showings as I was so I would say they probably did not.

Q. Did you advise them what you had seen or what you had determined from your examination of these samples and circulating the well you testified about? A. No, I did not.

Q. That was conveyed then I take it only to your employer Shell Oil?

A. Unless requested by Rocky Mountain—I could not recall any request they made other than they might have asked the type of rock we were in.

Q. They had an interest along with Shell Oil Company in knowing what type of rock they were in and what formations they were going through; didn't they?

Mr. Marcus: Object to that as calling for a legal conclusion as to what interest they had [104] together.

The Court: I think I will have to sustain the objection to that question.

Q. On how many occasions were drilling operations suspended at this well in order to obtain the samples for you or to circulate the well as you have described?

A. I believe it was suspended only once for circulation of samples.

Q. Did you request a core be taken out of the——

A. I asked them if it was possible to take a core, a certain core, yes.

(Testimony of Loren McIntyre.)

Q. Was that request of yours complied with?

A. It was not.

Q. Was there some explanation made to you as to why it could not be done at that time?

A. There was.

Q. What was that explanation?

A. They had lost circulation at the time and had an abundance of lost circulation material in the mud which would plug up the core barrel.

Q. You understood what they meant in oil drilling terms, I suppose?

A. It seemed very reasonable to me, yes.

Q. That was a reasonable explanation for their not furnishing you with a core at that particular time? [105]

Mr. Marcus: Object to that as calling for a conclusion. He stated what explanation was given.

The Court: Objection sustained.

Q. Are you acquainted with the mechanical procedure that is involved in circulating a well?

A. I understand it only to the extent they raise up off bottom and do circulate samples up.

Q. Does that susupend the actual drilling operation while that is being done?

A. It would suspend the actual drilling.

Q. And about how long does that procedure take normally, or did take on this occasion?

A. 15 to 30 minutes.

Q. Do you know what depth the well had been drilled when you arrived there or were you advised of that? A. 1,002 feet.

(Testimony of Loren McIntyre.)

Q. 1,002 feet? A. Yes.

Q. Approximately what depth had been drilled when you left the site in July?

A. I can't recall.

Q. Approximately?

A. 3,000, I believe. [106]

Cross-Examination

By Mr. Marcus:

Q. Mr. McIntyre, has your work with the Shell Oil Company been entirely confined to geology?

A. Yes, it has.

Q. Have you had any experience whatever in the actual drilling operations of drilling an oil well? A. No, I have not.

Q. And counsel asked you if you had instructions when you went up there, I will ask you what those instructions were with reference to your duties on that job?

A. They were only to collect the samples and report back in to Mr. Kirby.

Q. Did you have any instructions at any time that you were to have anything to do with the actual drilling operations?

A. No, on the contrary I was not.

Q. Did you at any time while you were up there have anything to do with the actual drilling operation by the Rocky Mountain Oil Corporation?

A. I did not.

Q. Your duties were restricted entirely to pick-

(Testimony of Loren McIntyre.)

ing up those samples and making your geological examination; is that right?

Mr. Coughlan: Object to that as leading. [107]

The Court: He may answer.

(Reporter read the pending question.)

A. That was correct.

Q. Did you at that time or were you subject at that time to any written regulations of your company with respect to duties of a geologist picking up samples on such an operation? A. I was.

Q. Will you identify what is marked Defendant's Exhibit 7?

A. This is a letter of instructions from Mr. Barkell to all geologists in the Salt Lake City division regarding well sitting duties.

Q. Well sitting duties? A. Yes.

Q. And is that what your duties would be called in carrying out the work you have described here?

A. That is correct.

Q. And were those regulations and instructions in effect at the time you came up to the well?

A. They were.

Q. And they were known to you?

A. Yes, they were.

Mr. Marcus: We offer Exhibit 7.

Mr. Zener: May I ask some questions? [108]

The Court: Yes.

Q. (By Mr. Zener): These instructions you are referring to were furnished only to employees of Shell Oil Company by their superior; is that cor-

(Testimony of Loren McIntyre.)

rect? A. That is correct.

Q. They were not available or known to anyone outside of your organization?

A. To the best of my knowledge, no.

Mr. Zener: We object on the ground it is incompetent, irrelevant and immaterial, and not binding upon third parties. It is self-serving and relates only to the relationship between Shell Oil and its employees.

The Court: I assume it is preliminary. I think you had better ask some more questions before I rule.

Q. (By Mr. Marcus): With respect to your instructions did you at all times abide by and conform to those instructions in carrying out your duties there at the well near Montpelier?

A. I did.

The Court: Exhibit 7 may be admitted.

Q. And you say the first time that you ever saw this well site or drill site was the evening before this accident took place? [109]

A. I believe it was two evenings before, it was May 30th.

Q. And that is the only time you were on the drill site prior to the time of this accident?

A. That is correct.

Q. And was Rocky Mountain operating—were they drilling at the time you went up there the first time? A. They were not.

Q. Were they shut down at that time?

A. Yes, they were.

(Testimony of Loren McIntyre.)

Q. Were there any employees present at the drill site when you were up there?

A. Not on my first arrival, no.

Q. The next time you were there was on the morning of June 1st? A. That is correct.

Q. Was that the time of this accident we are talking about? A. Yes, it was.

Q. Now you were present when Mr. Wuthrick and Mr. Prestidge came up to the drill site?

A. I was.

Q. At that time was this fire burning that you have heard described by other witnesses?

Mr. Zener: To which we object because I [110] think no inquiry was made on our behalf.

The Court: Objection sustained.

Q. Now you say you visited the drilling operations once or twice each day?

A. That is correct.

Q. And what did you do during the time that you went out there to visit the drill site?

A. I just collected up the samples and would hang around for a few minutes to watch those.

Q. How long were those visits at the site of the drill?

A. Generally from one to two hours.

Q. I believe you said on one occasion you asked them for a core and you were refused; is that true?

A. That is true.

Q. With respect to your geological work is that restricted and has it been restricted to a certain type of geology? A. It has.

(Testimony of Loren McIntyre.)

Q. Certain phase of geology? A. It has.

Q. Would you describe to the jury what that has been?

A. It is called stratigraphy. It is an accumulation of drill cuttings.

Q. It is—there is a definite field of geology concerning the rock formations? [111]

Mr. Zener: Object on the ground it is beyond the scope of our examination.

The Court: Objection sustained.

Q. But your work has been entirely restricted to the phase that you have described?

A. Yes.

Redirect Examination

By Mr. Zener:

Q. The phase of the work you have done geologically has to do with the determination of geological facts that indicate or do not indicate the presence of oil; is that not right?

A. No, not necessarily.

Q. What purpose were you serving then at this oil drilling rig?

A. So I could notify the geology as we encountered to our immediate superior and when and if we reached the sandstone as I mentioned before.

Q. Wasn't it a matter—as a matter of fact, wasn't it designed to determine the likelihood or possibility of oil being in this area?

A. We were looking for oil shows of course in the immediate area.

(Testimony of Loren McIntyre.)

Q. But you were looking for oil, weren't you?

A. Well, yes. [112]

Q. Now in the taking of these samples in order to take those samples what mechanical operations are necessary in respect to the drilling operations?

Mr. Marcus: This is repetitious and object to it on that ground.

The Court: I don't remember that that was covered.

A. With respect to drilling there was no mechanical operations.

Q. Well, what mechanical operations were necessary?

A. Only that someone collect the samples out at the end of the flow line.

Q. At the end of what? A. The flow line.

Q. This flow line, where does that come from?

A. It comes from where the mud comes out the hole.

Q. Comes from the bottom of the well or where the drilling operation is being conducted?

A. Mud comes from there, yes.

Q. Doesn't the samples come from there, too?

A. Yes.

Q. As a matter of fact, the samples are an example of the type of rock formation that the drilling cut through; isn't that what it amounts to?

A. Yes, what the drill has cut through. [113]

Q. And so the sample that you received was a product of the drilling operation; isn't that right?

A. It came as a result of the drilling, yes.

(Testimony of Loren McIntyre.)

Recross-Examination

By Mr. Marcus:

Q. Was there any actual drilling at all on the morning of the first from the time you got out there up to and including the time this accident occurred? A. There was not.

Mr. Marcus: That is all.

Mr. Zener: That is all.

Mr. Marcus: May we present a matter to the Court at this time?

The Court: You may.

(Jury was duly excused.) [114]

Mr. Coughlan: If your Honor please, at this time the plaintiff moves that pursuant to Rule 36 and Rule 37 of the Federal Rules of Civil Procedure to strike the answer and all subsequent pleadings of the defendant and to enter judgment by default for the plaintiff for the amount prayed for in the complaint upon the grounds and for the following reasons: That plaintiff served interrogatories upon the defendant upon the 12th day of September, 1955, which to date have not been answered, and in addition served request for admissions upon the defendant upon the 12th day of September, 1955, in this matter which to date have not been complied with.

(Argument off the record.)

Mr. Aadnesen: May I suggest at this time that

a stipulation be entered into between counsel that the exhibits be withdrawn. I thought that was understood. We waited yesterday so we could get them back, certainly we would have no objection to that. We could substitute copies in the other case at the request of either counsel.

The Court: If it becomes necessary that could certainly be done. [115]

Mr. Coughlan: I am not stipulating to anything about this thing. I am urging my motion and I want that understood.

The Court: Well, the—under the circumstances I am going to deny your motion provided that the answers to the interrogatories and admissions in the other may be used in this case.

(Argument continued off the record.)

The Court: Your motion, Mr. Coughlan, will be denied with the understanding that it will be worked out. We will take a ten-minute recess. [116]

1:05 P.M.

Mr. Zener: At this time we request permission of the Court to read to the jury certain requests for admissions and the response of the defendant to those admissions.

Mr. Marcus: We interpose an objection to the reading of the requests and response on the ground it is improper primary evidence and reserve our right to object to each specific point.

The Court: Objection overruled, they may be

read. You had better identify them and read them then—better offer them first.

Mr. Zener: At this time we offer in evidence what has been marked for identification as Plaintiff's Exhibit No. 8, being a request for admissions and Plaintiff's Exhibit No. 9 being a response to request for admissions.

Mr. Marcus: We renew our objection.

The Court: Objection overruled. They may be admitted.

Mr. Zener: These are request for admissions in this cause made by the plaintiff, Lanus Wayne Prestidge of the defendant Shell Oil Company "to make [117] the following admissions for the purposes of this action only, and subject to all pertinent objections to admissibility which may be interposed at the trial.

"I.

"That the annexed Exhibit 'A' is a true and correct copy of Designation of Operator filed by you with the Bureau of Land Management in Boise, Idaho." Said Exhibit A reads as follows:——

Mr. Marcus: Now, your Honor, we may be a little bit clumsy with these objections but may it be understood that we object to the reading of each instrument that is submitted in response to the admissions on the ground that the relevancy and competency of such instrument must be shown by the plaintiff before it is submitted in evidence, and that no proper foundation has been made for the admissions.

The Court: Objection overruled. I think the in-

struments themselves speak for themselves. Objection overruled.

Mr. Zener: The Exhibit A referred to reads as follows:

"Exhibit A

"Department of Interior U. S. Geological Survey
Received July 27, 1953 Received July 23, 1953
Bureau of Land Management Casper, Wyoming
Idaho Dist., Land Office, Boise, Idaho
Sppervisor, Oil and Gas Operations: [118]

Designation of Operator

The undersigned is, on the records of the Bureau of Land Management, holder of oil and gas lease.

District Land Office: Idaho, Boise, Idaho.
Serial No: Idaho 045.

and hereby designates

Name: Rocky Mountain Oil Corporation.
Address: 608 Kittredge Building, Denver, Colorado.

as his operator and local agent, with full authority to act in his behalf in complying with the terms of the lease and regulations applicable thereto and on whom the supervisor or his representative may serve written or oral instructions in securing compliance with the Oil and Gas Operating Regulations with respect to (describe acreage to which this designation is applicable):

Township 12 South, Range 46 East, Boise Meridian, Idaho. Section 30: Lot 2.

It is understood that this designation of operator does not relieve the lessee of responsibility for compliance with the terms of the lease and the Oil and Gas Operating Regulations. It is also understood that this designation of operator does not constitute an assignment of any interest in the lease.

In case of default on the part of the designated operator, the lessee will make full and prompt compliance with all regulations, [119] lease terms, or orders of the Secretary of the Interior or his representative.

The lessee agrees promptly to notify the oil and gas supervisor of any change in the designated operator.

SHELL OIL COMPANY,
By S. F. BOWLBY,
By R. PATTON,
Assistant Secretary,
1006 West Sixth Street,
Los Angeles 17, California,
Lessee."

July 20, 1953.
BLM at Boise, Idaho.

Mr. Coughlan: This is the response to request for admissions in the case of Lanus Wayne Prestidge, plaintiff, vs. Shell Oil Company, a corporation, defendant. "The Shell Oil Company, by the undersigned, answering the request for admissions says:

I.

That Exhibit "A," attached to the request for admissions, is a true and correct copy of Designation of Operator filed with the Bureau of Land Management."

Mr. Zener: "II. That on June 2, 1954, Rocky Mountain Oil Corporation operations on Lot 2, Section 30, Tp. 12, SR 46 EBM, were being conducted under Exhibit 'A,' leases, agreements and assignments to be furnished pursuant [120] to Interrogatories 1, 2, 3, 4, 5 & 6 directed to Shell Oil Company."

Mr. Coughlan: The Shell Oil Company, by the undersigned, answering the request for admissions says: "II. That the well drilled by Rocky Mountain Oil Corporation was drilled under the provisions of the Wheeler and Gray agreement."

Mr. Zener: "III. That Exhibit 'B' is a true and correct copy of a letter sent by Shell Oil Company to Rocky Mountain Oil Corporation subsequent to June 2, 1954."

Mr. Marcus: We object to this letter and the admission of this letter in evidence in this matter upon the ground it is incompetent and certainly irrelevant to this case.

The Court: You might read the response to it before you read the letter.

Mr. Coughlan: "III. Admits that Exhibit 'B' is a true and correct copy of a letter from Shell Oil Company to Rocky Mountain Oil Corporation, but was not accepted by Rocky Mountain Oil Corporation."

The Court: Objection sustained as to that exhibit. I can't see how that is material.

Mr. Zener: "That 'Exhibit C' is a true and correct copy of confirmation and assignment executed by Rocky Mountain Oil Corporation at Shell Oil Company's [121] request and delivered to Shell Oil Company subsequent to June 2, 1954."

Mr. Coughlan: The Shell Oil Company, by the undersigned, answering the request for admissions says: "IV. Admits that Exhibit 'C' is a true and correct copy of confirmation and assignment."

Mr. Zener: Exhibit C reads as follows:

"LEK:mm 6/11/54.
Giveout Anticline.
Wheeler-Gray Operating Agreement.

Exhibit 'C'

Confirmation and Assignment

This Agreement, made and entered into this ..... day of ....., 1954, by and between Rocky Mountain Oil Corporation, a corporation (hereinafter referred to as 'Grantor') and Shell Oil Company, a Delaware corporation (hereinafter referred to as 'Shell').

Witnesseth

That, Whereas, pursuant to an Operating Agreement dated December 26, 1952 (hereinafter referred to as 'said Operating Agreement') by and between Shell and Wheeler and Gray, a partnership, predecessor in interest of Grantor, Shell assigned, by Assignment (hereinafter referred to as 'said assignment') dated July 15, 1953, to Grantor United

States Oil and Gas Lease Serial No. Idaho 045 (hereinafter referred to as 'said assigned [122] lease') as to, but only as to, the following described lands (hereinafter referred to as 'said land'), situated in the County of Bear Lake, State of Idaho, to wit:

Township 12 South, Range 46 East, Boise Meridian, Idaho. Section 30: Lot 2;

subject to an overriding royalty of one-half of one per cent (½ of 1%) in favor of Ragnar Barhaug; the segregated portion of said assigned lease covering said land having been assigned Serial No. Idaho 045-A (hereinafter referred to as 'said segregated lease');

And, Whereas, said segregated lease expired by its own terms on February 1, 1954, and Grantor has acquired, by an approved assignment from G. W. Anderson, United States Oil and Gas Lease Idaho 05081, dated May 1, 1954 (hereinafter referred to as 'said lease') the current United States Oil and Gas Lease covering said land; subject, however to an overriding royalty of one-half of one per cent (½ of 1%) in favor of said G. W. Anderson;

And, Whereas, Grantor desires to confirm that said lease is and shall be subject to all the terms and provisions of said Operating Agreement and said assignment, and to the royalties and overriding royalties appertaining to said segregated lease;

Now, Therefore, Grantor hereby confirms and agrees that said lease is and shall be subject to all the terms and provisions of [123] said Operating Agreement and hereby sells, assigns, transfers and

conveys to Shell all royalties and other rights or benefits under said lease by virtue of said assignment; a copy of which is attached hereto and by this reference incorporated herein and made a part hereof, with like effect as if said lease were the lease referred to in said assignment. Grantor further agrees that said lease and the production obtained therefrom is and shall be subject to the overriding royalties hereinabove mentioned, to wit:

(1) One-half of one per cent (½ of 1%) in favor of Ragnar Barhaug, and

(2) One-half of one per cent (½ of 1%) in favor of G. W. Anderson.

In Witness Whereof, the parties hereto have executed this agreement as of the day and year first herein written.

ROCKY MOUNTAIN OIL CORPORATION,
By /s/ JOHN J. McINTYRE,
President;
By /s/ JOHN G. OBRECHT,
Secretary."

SHELL OIL COMPANY,
By .....,
Manager, Land Department.

Mr. Zener: "That 'Exhibit D' is a true and correct copy of a letter written to Shell Oil Company by President of Rocky Mountain Oil Corporation on October 11, 1954."

Mr. Coughlan: Shell Oil Company, by the undersigned, answering the request for admissions says: [124]

"V. Admits that Exhibit 'D' is a true and correct copy of the letter written the Shell Oil Company by John J. McIntyre of the Rocky Mountain Oil Corporation.

SHELL OIL COMPANY,
By /s/ JOHN J. MOHR."

(Mr. Coughlan continued reading as follows:)

"State of Idaho,
County of Bannock—ss.

John J. Mohr, being first duly sworn, states that he executed the above admissions for and on behalf of the Shell Oil Company; that said admissions are true as he verily believes.

/s/ JOHN J. MOHR.

Subscribed and Sworn to Before Me this 3rd day of October, 1955.

[Seal] GUS CARR ANDERSON,
Notary Public for Idaho."

Mr. Marcus: I object to the reading in evidence of this letter as it shows on its face that it could have no materiality to this particular case.

Mr. Zener: I think we will have to agree to that.

The Court: Objection sustained.

Mr. Zener: At this time we desire to read into the record the interrogatories by plaintiff [125] addressed to Shell Oil Company in this cause, and the answers to the interrogatories.

Mr. Marcus: To which we object as being im-

proper and no proper foundation having been laid for them.

The Court: Is the witness or person that answered the interrogatories present?

Mr. Zener: No, I am advised that the person answering is not.

The Court: Is it agreed that the person answering the interrogatories is not present and available to testify.

Mr. Marcus: Your Honor, the person is not present and it is Mr. Mohr.

The Court: The interrogatories and the responses thereto may be read. [126]

(Mr. Zener and Mr. Coughlan then read the interrogatories and answers to the interrogatories into the record.)

Mr. Zener: "You are hereby notified to answer under oath the interrogatories numbered 1 to 50 as shown below within 15 days of the time of service is made upon you, in accordance with Rule 33 of Federal Rules of Civil Procedure. 1. Furnish true copy of U. S. Oil & Gas Lease Idaho 045 between you and Federal Bureau of Land Management."

Mr. Coughlan: Answer to interrogatory: "State of Idaho—County of Bannock, ss. John Mohr, being duly sworn, deposes and says: I am the District Land Manager for Shell Oil Company, defendant in the above action, and agent of that corporation, for the purpose of answering the interrogatories of Plaintiff. I have read the interrogatories and the

following answers are true according to the best of my knowledge, information and belief:

1. "Copy of U. S. Oil & Gas Lease Idaho 045 submitted."

Mr. Zener: "Furnish true copy of Agreement dated the 26th day of December, 1952, and exhibits attached thereto, between you and Wheeler and Gray pertaining to Lot 2, Section 30, Tp. 12, SR 46 EBM."

Mr. Coughlan: "2. Copy of Wheeler and Gray Agreement of December 26, 1952, submitted."

Mr. Zener: "3. Furnish true copy of Assignment from Wheeler and Gray to Mountain Oil Corporation executed March 6, 1953." [127]

Mr. Coughlan: "3. Copy of Assignment from Wheeler and Gray to Rocky Mountain Oil Corporation submitted."

Mr. Zener: "4. Furnish true copy of consent by you to the Assignment referred to in Interrogatory No. 3 executed August 7, 1953, by S. F. Bowlby."

Mr. Coughlan: "4. Copy of consent submitted."

Mr. Zener: "5. Furnish true copy of Partial Assignment of Oil & Gas Lease between you and Rocky Mountain Oil Corporation executed July 15, 1953, pertaining to Lot 2, Section 30, Tp. 12, SR 46 EBM."

Mr. Coughlan: "5. Copy of Partial Assignment from Shell Oil Company to Rocky Mountain Oil Corporation submitted."

Mr. Zener: "6. Furnish true copy of confirmation and assignment as to above Agreements and

property dated on or about June 11, 1954, between you and Rocky Mountain Oil Corporation."

Mr. Coughlan: "6. Copy of confirmation and assignment of June 11, 1954, submitted."

Mr. Zener: "7. Did you do geological and title work on lands in connection with U. S. Oil & Gas Lease Idaho 045, and was the expense in connection therewith paid by you?"

Mr. Marcus: May we have just a moment, perhaps we can shorten our objections to avoid objecting to each one of the questions. We object to each one of the question following No. 7 through question number 50 upon the ground and for the reason that such questions and answers are irrelevant and immaterial as being [128] specific provisions contained in the drilling contract referred to commonly as the Wheeler and Gray agreement.

The Court: I will have to rule on them as I come to the question. May it be understood the objection runs to all those questions?

Mr. Zener: Yes.

The Court: Objection overruled as to 7.

Mr. Coughlan: "7. Yes. Prior to Wheeler and Gray Agreement."

Mr. Zener: "8. Was geological data and title data furnished by you to Rocky Mountain Oil Corporation concerning U. S. Oil and Gas Lease Idaho 045?"

Mr. Coughlan: "8. Such data was furnished as provided in Wheeler and Gray Agreement."

Mr. Zener: "9. Did you on June 2, 1954, own

leases to properties adjacent to Lot 2, Section 30, Tp. 12, SR 46 EBM, upon which the oil well was drilled by Rocky Mountain Oil Corporation?"

Mr. Coughlan: "9. Yes."

Mr. Zener: "10. Please attach plat showing location of land assigned to Rocky Mountain Oil Corporation under partial assignment of lease and adjacent properties held by you."

Mr. Coughlan: "10. Plat is attached."

Mr. Zener: "11. Did you require that the drilling of the oil well commence prior to June 26, 1953?"

Mr. Coughlan: "11. Assuming this question refers to the [129] well on Lot Two, Section 30, the Wheeler and Gray Agreement provided such well was to be started by June 26, 1953."

Mr. Zener: "12. Did you fix the location of the well?"

Mr. Coughlan: "12. The location was provided under the terms of the Wheeler and Gray Agreement."

Mr. Zener: "13. Did you require the well to be drilled to a certain depth?"

Mr. Coughlan: "13. Well required to be drilled to a certain depth under the Wheeler and Gray Agreement."

Mr. Zener: "14. (a) Was there a time limit with which the well was to be drilled. (b) What was that?"

Mr. Coughlan: "14. The time limit was fixed in the Wheeler and Gray agreement; said well to be prosecuted to completion after starting."

Mr. Zener: "15. (a) Did you grant extensions of time for completion of drilling the well to Rocky Mountain Oil Corporation? (b) If so, how many? (c) When were they given?"

Mr. Coughlan: "15. No."

Mr. Zener: "16. (a) Please state the names of your officials, employees or representatives on the premises at the oil well during the drilling operation by Rocky Mountain Oil Corporation. (b) State their duties and how long they remained upon the premises. (c) Did your geologist take daily samples during the drilling by Rocky Mountain Oil Corporation?" [130]

Mr. Coughlan: "16. a. Mr. Loren McIntyre, geologist, was at property on June 2, 1954, to inquire about samples:

b. His duty was to collect samples for Shell Oil Company: remained on premises only long enough to get such samples;

c. Collected samples daily during actual drilling."

Mr. Zener: "17. Was this well drilled in order to give you a test for the adjacent properties held by you?"

Mr. Coughlan: "17. The well was drilled to test the assigned lease property and to obtain information which the well might reveal."

Mr. Zener: "18. Does Rocky Mountain Oil Corporation owe you for rentals paid by you on their behalf on lands covered by U. S. Oil & Gas Lease Idaho 045?"

Mr. Coughlan: "18. No."

Mr. Zener: "19. Was Rocky Mountain Oil Corporation required to make tests on the well and satisfactory to you upon your request?"

Mr. Coughlan: "19. Only as provided in the Wheeler and Gray contract."

Mr. Zener: "20. Were you, under your Agreement with Rocky Mountain Oil Corporation, to have full access to the well and records concerning the drilling of the well?"

Mr. Coughlan: "20. Yes. As provided in the Wheeler and Gray contract."

Mr. Zener: "21. Was a requirement of yours that in the event oil or gas showed during the drilling by Rocky Mountain Oil [131] Corporation they were to cease drilling?"

Mr. Coughlan: "21. To stop drilling only temporarily until parties could observe testing."

Mr. Zener: "22. Was it your requirement and agreement with Rocky Mountain Oil Corporation that your representatives were to be present at the testing of the well?"

Mr. Coughlan: "22. The contract granted our representatives the opportunity to be present at the testing."

Mr. Zener: "23. Was Rocky Mountain Oil Corporation to furnish you drill cuttings at 10-foot intervals from 2,500 feet on?"

Mr. Coughlan: "23. Yes. As provided in the Wheeler and Gray contract."

Mr. Zener: "24. Was Rocky Mountain Oil Corporation to furnish you will all drilling information

samples and a day-to-day drilling report during the drilling of the well?"

Mr. Coughlan: "24. As provided in the Wheeler and Gray contract."

Mr. Zener: "25. Was Rocky Mountain Oil Corporation required to furnish you with a certified copy of the complete log upon the completion of the well?"

Mr. Coughlan: "25. Yes, under the terms of the contract."

Mr. Zener: "26. Was it not a requirement that prior to the plugging of the well and after its competition, a representative of yours was to determine if the proper depth was reached?" [132]

Mr. Coughlan: "26. Contract required proof that well had been drilled to depth provided; the dry-hole money was to be paid as provided in contract."

Mr. Zener: "27. Did you have a right to request steel line measurements to be made in the presence of your representatives, said steel line measurement to be made by Rocky Mountain Oil Corporation?"

Mr. Coughlan: "27. Our representatives had the right to check to determine if well was drilled to the depth required by contract."

Mr. Zener: "28. Was Rocky Mountain Oil Corporation to furnish you with a Schlumberger Log?"

Mr. Coughlan: "28. Yes."

Mr. Zener: "29. Was it not an agreement that the well could not be plugged until 24 hours after the delivery of the Schlumberger Log to you?"

Mr. Coughlan: "29. Yes."

Mr. Zener: "30. Was not Rocky Mountain Oil Corporation to make tests of showings if you so requested?"

Mr. Coughlan: "30. Yes."

Mr. Zener: "31. Was it not the agreement between you and Rocky Mountain Oil Corporation that there were to be no liens permitted upon the well or premises which would jeopardize your over-riding royalty?"

Mr. Coughlan: "31. Yes." [133]

Mr. Zener: "32. Was it not a further agreement that there could be no abandonment of the oil well without 15 days' notice to you?"

Mr. Coughlan: "32. Yes."

Mr. Zener: "33. Was not Shell Oil Company to have the right to make tests at its own expense within the 15-day period prior to an abandonment?"

Mr. Coughlan: "33. Yes."

Mr. Zener: "34. Could not Shell Oil elect to take over the well and have the premises reassigned to it free and clear of all encumbrances in the event of an abandonment?"

Mr. Coughlan: "34. Yes."

Mr. Zener: "35. What was the agreement in the event that Shell Oil Company should take over the well with respect to reimbursing Rocky Mountain Oil Corporation for salvage value and other costs?"

Mr. Coughlan: "35. As provided in the Wheeler and Gray Agreement."

Mr. Zener: "36. Please state to what exent you

would share in the losses of the venture in the event oil was not obtained?"

Mr. Coughlan: "36. Our company did not share in the losses of the venture."

Mr. Zener: "37. How much per foot were you to pay toward the cost of the well in the event of a dry hole?" [134]

Mr. Coughlan: "37. If well drilled to required depth contract obligation to pay fixed amount, depending on footage, not to exceed $8,250."

Mr. Zener: "38. What consideration was to be paid to Rocky Mountain Oil Corporation by you in the way of assignment of acreage for drilling this well?"

Mr. Coughlan: "38. As provided in the Wheeler and Gray Agreement."

Mr. Zener: "39. Who was to pay the rentals on this acreage? (a) Did you pay rentals on this? (b) Does Rocky Mountain Oil Corporation owe you now for the rentals?"

Mr. Coughlan: "39. a. Shell Oil Company to pay rentals and to be reimbursed; b. No."

Mr. Zener: "40. Please state to what extent Shell Oil Company would participate in the profits in the event the drilling turned out to be a producing well."

Mr. Coughlan: "40. Shell Oil Company would not participate in profits, only entitled to contract over-riding royalty."

Mr. Zener: "41. Was not Shell Oil Company frequently consulted in connection with the drilling of this oil well?"

Mr. Coughlan: "29. Yes."

Mr. Zener: "30. Was not Rocky Mountain Oil Corporation to make tests of showings if you so requested?"

Mr. Coughlan: "30. Yes."

Mr. Zener: "31. Was it not the agreement between you and Rocky Mountain Oil Corporation that there were to be no liens permitted upon the well or premises which would jeopardize your over-riding royalty?"

Mr. Coughlan: "31. Yes." [133]

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Mr. Zener: "39. Who was to pay the rentals on this acreage? (a) Did you pay rentals on this? (b) Does Rocky Mountain Oil Corporation owe you now for the rentals?"

Mr. Coughlan: "39. a. Shell Oil Company to pay rentals and to be reimbursed; b. No."

Mr. Zener: "40. Please state to what extent Shell Oil Company would participate in the profits in the event the drilling turned out to be a producing well."

Mr. Coughlan: "40. Shell Oil Company would not participate in profits, only entitled to contract over-riding royalty."

Mr. Zener: "41. Was not Shell Oil Company frequently consulted in connection with the drilling of this oil well?"

Mr. Coughlan: "41. No."

Mr. Zener: "42. If the well were a producer, then was Rocky Mountain Oil Corporation required to drill three more wells within not more than three months' time interval between the drilling of wells?" [135]

Mr. Coughlan: "42. No."

Mr. Zener: "43. Was it not true that the Lease Agreement or any of the production of the well could not be assigned first without the consent of Shell Oil Company?"

Mr. Coughlan: "43. No. Shell Oil Company had right of first refusal."

Mr. Zener: "44. Were you not entitled to take all the production of the well should you so desire?"

Mr. Coughlan: "44. Shell Oil Company had the right to buy production."

Mr. Zener: "45. Was it not the agreement that the lease under which Rocky Mountain Oil Corporation operated could not be surrendered without first offering it to Shell Oil Company?"

Mr. Coughlan: "45. Yes."

Mr. Zener: "46. Was it not a requirement that in the event an assignment was made by Rocky Mountain Oil Corporation it was to be subject to the agreement between Rocky Mountain Oil Corporation and Shell Oil Company?"

Mr. Coughlan: "46. Yes."

Mr. Zener: "47. Was it not the agreement that in any event an assignment could not be made for financing by Rocky Mountain Oil Corporation until the well was completely drilled?"

Mr. Coughlan: "47. Under contract the Rocky Mountain Oil Corporation had the right to assign a certain percentage of production." [136]

Mr. Zener: "48. Were not the operations being carried out on June 2, 1954, at the well site pursuant to your agreements previously made with Rocky Mountain Oil Corporation?"

Mr. Coughlan: "48. The well was being drilled under the provisions of the Wheeler and Gray agreement."

Mr. Zener: "49. On June 2, 1954, did you not have other agreements and arrangements with Rocky Mountain Oil Corporation for the drilling of wells in Wyoming, Utah and other states?"

Mr. Coughlan: "49. No."

Mr. Zener: "50. Did you subsequent to June 2, 1954, pay the dry hole money provided for in the Contract in connection with the drilling of this well?"

Mr. Coughlan: "50. The dry hole money was paid as provided in the Wheeler and Gray agreement."

Signed "John E. Mohr."

"Subscribed and sworn to before me this 3rd day of October, 1955."

"GUS CARR ANDERSON,
Notary Public for Idaho."

Mr. Zener: At this time we offer in evidence Plaintiff's Exhibit 10, the oil and gas lease referred to here as the Barhaugh lease.

Mr. Marcus: No objection.

The Court: Exhibit 10 may be admitted.

Mr. Zener: We offer in evidence what has been marked for identification as Plaintiff's Exhibit 11, what is referred to [137] as the Wheeler-Gray Agreement.

Mr. Marcus: No objection.

The Court: It may be admitted.

Mr. Zener: We offer what has been marked for identification as Plaintiff's Exhibit 12 entitled "Assignment" with attached "Consent."

Mr. Marcus: No objection.

The Court: It may be admitted.

Mr. Zener: We offer in evidence what has been marked as Plaintiff's Exhibit 13, designated as "Partial Assignment of Oil and Gas Lease."

Mr. Marcus: No objection.

The Court: May be admitted.

Mr. Zener: We offer what has been marked as Plaintiff's Exhibit No. 14, being a plat.

Mr. Marcus: Object to that as being irrelevant and immaterial.

The Court: It may be admitted. Objection overruled.

Mr. Zener: At this time we would like permission of the Court to read one of the exhibits to the jury. We would like to read the Wheeler and Gray Agreement.

The Court: Very well, you are entitled to read it.

Mr. Marcus: Won't these be given to the jury?

The Court: Yes; they will and either party may refer to them.

Mr. Coughlan: (Read the following portion of Exhibit 11 to the jury:) [138]

"This Agreement, made and entered into this 26th day of December, 1952, by and between Wheeler and Gray, a partnership consisting of Bert Wheeler and Lloyd Gray (hereinafter called 'Wheeler and Gray'), and Shell Oil Company, a Delaware Corporation (hereinafter called 'Shell');

"Witnesseth

"That, Whereas, Shell is the owner and holder of certain oil and gas leases covering property in Bear Lake County, Idaho, said leases and certain portions of the lands covered thereby (sic) being particularly described in Exhibit 'A' attached hereto and hereby made a part hereof, and hereinafter called 'said lease' and 'said lands' respectively;

"And whereas, Shell has agreed, conditioned upon the performance by Wheeler and Gray of the covenants and agreements hereinafter contained, to assign to Wheeler and Gray said leases as to, but only as to, said lands;

"Now Therefore, in consideration of the premises and of the respective agreements hereinafter set forth, it is mutually agreed by and between Shell and Wheeler and Gray as follows, to wit:

"1. Shell makes no warranty whatsoever as to the validity of said leases as to said lands or the title thereto. Shell does, however, state that it has not transferred, conveyed or encumbered any interest in said leases as to said lands or any interest in said substances which may be produced thereunder. [139]

"2. Concurrently with the date hereof Shell is

lending Wheeler and Gray for a reasonable period of time all title data which Shell has pertaining to said lands. It is expressly understood that the furnishing of such data to Wheeler and Gray as aforesaid is solely for Wheeler and Gray's convenience and Shell makes no representation to Wheeler and Gray relative to the contents or accuracy of any thereof. Wheeler and Gray shall have sixty (60) days from the date hereof in which to make such investigation in connection with the title to said lands and said leases as it desires. Failure of Wheeler and Gray to give Shell written notice within said 60-day period setting forth specific objections to title to said lands or said leases will be deemed an acceptance of title by Wheeler and Gray. The parties hereto shall have thirty (30) days after the giving of any such notice setting forth objections to title within which period to attempt to cure any requirements affecting title. If the parties are unable within the 30-day period to cure any such requirements so made, Wheeler and Gray may nevertheless elect to waive them, but in any event Wheeler and Gray shall be required to accept or reject title as to all of said lands in writing within five (5) days after the expiration of said 30-day period. Failure of Wheeler and Gray to give Shell written notice of rejection of title within five (5) days following the expiration of said 30-day period will likewise be deemed an acceptance of title by Wheeler and Gray. In the event of [140] rejection of title as aforesaid, this agreement shall thereupon terminate without any liability whatsoever on the

part of either party hereto. In the event of acceptance of title as aforesaid, Shell thereupon shall execute and deliver to Wheeler and Gray an assignment in the form of Exhibit B attached hereto and hereby made a part hereof, of all its right, title, interest and estate in and to Lot 2 of Section 30, Township 12 South, Range 46 East, Boise Meridian, Idaho.

"3. On or before June 26, 1953, Wheeler and Gray shall commence the drilling of a test well (hereinafter called 'test well') at a location in the approximate center of said Lot 2, and shall thereafter prosecute the drilling of the test well to 'completion,' i.e., until (a) it is drilled to a vertical depth of 5,000 feet below the surface, or (b) it is drilled to a depth sufficient to test the Nugget formation to the satisfaction of Shell or (c) the parties hereto shall determine that further drilling therein would not be warranted, whichever first occurs.

"4. Tests satisfactory to Shell shall be made by Wheeler and Gray of all possible producing horizons in the test wall. In the event any showing or showings of oil or gas are encountered, Wheeler and Gray shall cease drilling and at once notify Shell at its office at Casper, Wyoming, so that Shell may have a representative present to witness the testing of any such showing. Shell's representatives shall have full and complete access to the well and drilling records at all times. Drilling operations [141] shall be so conducted that at all times satisfactory samples of drill cuttings are obtained by Wheeler and Gray for Shell at 10-foot intervals from 2500 feet

to total depth. The upper 50 feet of the Nugget formation shall be cored by Wheeler and Gray and, in the event that oil staining is encountered, Wheeler and Gray shall take further cores of such formation so long as oil staining persists. Wheeler and Gray shall furnish Shell any and all drilling information and samples of all formations, including cores, and upon request samples of any fluids encountered in the drilling of said well. Wheeler and Gray shall furnish daily to Shell's office at Casper, Wyoming, a drilling report giving formations encountered, and accurate depths of same for the previous day's drilling, and, upon completion of the well, a certified copy of the complete log. Shell shall be provided with copies of any logs which may be run, such as radioactivity logs, caliper surveys, mud logs, etc. If the test well is dry, and before plugging is commenced, Wheeler and Gray will notify Shell at its office at Casper, Wyoming, in sufficient time to permit representatives of Shell to determine whether the test well has reached the required depth, and, should Shell request, a steel line measurement of the hole must be taken in the presence of representatives of Shell. Shell shall be furnished with a Schlumberger log, or other electrical log acceptable to Shell, on conventional scale, of the test well to its greatest depth. Wheeler and Gray shall [142] not plug the test well until twenty-four (24) hours after delivery of said log, the delivery to be made during regular business hours. If any of such Schlumberger surveys, in Shell's opinion, should indicate a show-

ing of oil or gas, Wheeler and Gray shall make an adequate test of such showing.

"5. Any and all costs of any nature whatsoever incurred by Wheeler and Gray in conducting operations hereunder or under said leases as to said lands shall be borne, except as provided in Article 7 herein, entirely by Wheeler and Gray and shall be entirely free of cost to Shell. Wheeler and Gray shall pay all bills promptly, and shall not permit any liens to accrue against the leasehold estate covering Lots 1 and 2, and the E½NW¼ of Section 30, Township 12 South, Range 46 East, Boise Meridian, Idaho, or any equipment used in connection therewith that would in any manner jeopardize Shell's overriding royalty share as set forth in Exhibit B hereof, or rights hereunder.

"6. The test well shall not be abandoned by Wheeler and Gray without fifteen (15) days' prior written notice thereof to Shell. At any time within said fifteen-day period Shell may, at its own cost and expense, make tests of any nature in such well; and at any time within said fifteen-day period Shell may elect to take over such well and receive from Wheeler and Gray a reassignment of the United States Oil and Gas Lease with respect to said Lot 2 free and clear of any encumbrances or other obligation whatsoever incurred by Wheeler [143] and Gray. Shell shall reimburse Wheeler and Gray for any extra expense incurred by Wheeler and Gray by reason of any exercise of the right to make tests herein given to Shell. Upon taking over any such well, Shell shall pay Wheeler and Gray the net

salvage value of any recoverable property and equipment of Wheeler and Gray therein or thereon, less the reasonable cost of plugging such well. 'Net salvage value' shall mean the then market value of such recoverable property and equipment on the ground at the well, less the reasonable cost of recovering same.

"7. In the event the test well is drilled to completion and is abandoned as a dry hole, Shell agrees thereupon to pay to Wheeler and Gray the sum of One and 50/100 Dollars ($1.50) per foot for the first 3,500 feet and Two Dollars ($2.00) per foot for the next 1,500 feet with respect to the depth to which the test well is drilled. In no event shall the total sum to be paid by Shell exceed Eight Thousand Two Hundred Fifty Dollars ($8,250.00) dry-hole money.

"8. Upon compliance by Wheeler and Gray with all of its obligations under Articles 3 and 4 hereof, Shell thereupon shall execute and deliver to Wheeler and Gray assignments of all its right, title, interest and estate in and to said leases as to, but only as to, said lands. The assignment with respect to Lot 1 and the E½NW¼ of Section 30 in Township 12 South, Range 46 East, Boise Meridian, Idaho, shall be in the form of said Exhibit B. The assignments with respect to the balance of said lands shall be in the form of Exhibit C attached hereto and hereby made a part hereof. Until such time as the [144] assignments of said lands are made, Shell shall promptly pay the rentals which may accrue with respect to said lands to be assigned and Wheeler and

Gray shall promptly reimburse Shell for any rentals so paid by Shell.

"9. In the event said test well is completed as a well capable of producing oil in paying quantities (i.e., quantities sufficient to repay the cost of drilling and operating the test well plus a reasonable profit), then Wheeler and Gray shall thereafter keep one string of tools in continuous operation allowing not more than six months between completion of one well and the commencement of drilling of the next succeeding well until there shall have been completed in the same zone in which the test well was completed at least one well on each of the following parcels in Section 30, Township 12 South, Range 46 East, Boise Meridian, Idaho: Parcel 1—Lot 1; Parcel 2—NE¼NW¼; Parcel 3—SE¼NW¼.

"10. Wheeler and Gray shall not have the right to assign or transfer any right or obligation under this agreement without the prior written consent of Shell. The consent by Shell with respect to any such assignment or transfer shall not operate or be construed as a waiver with respect to any other or subsequent assignments or transfers.

"11. Any notice or instrument herein provided to be given or delivered by either party to the other (except when otherwise specified herein) may be given by delivering the same in person or by depositing the same in any United States Post [145] Office, registered, postage prepaid, addressed as follows:

"To Wheeler and Gray, c/o Bert Wheeler, 666 Vista Lane, Lakewood, Colorado;

"To Shell at 1008 West Sixth Street, Los Angeles 17, California, or at such other address as may be designated by similar notice. Any such notice or instrument shall be deemed to have been received by the party to whom the same is addressed at the expiration of forty-eight (48) hours after the deposit of the same in the United States Post Office for transmission by registered mail as aforesaid.

"12. The terms, provisions and conditions of this agreement shall bind and inure to the benefit of the respective heirs, executors, administrators, successors and assigns of the parties hereto.

"In Witness Whereof, the parties hereto have executed this agreement as of the day and year first above written.

"WHEELER AND GRAY;
"By /s/ BERT WHEELER,
"By /s/ LLOYD GRAY.
"SHELL OIL COMPANY;
"By /s/ S. F. BOWLBY,
"Vice President." [146]

Mr. Zener: I believe there is only one other matter. That is the matter of stipulating between counsel that the Barhaugh lease which has been introduced in evidence as Exhibit No. 10 was acquired by Shell Oil Company after the date of the execution.

Mr. Marcus: Yes; that is stipulated.

Mr. Zener: The plaintiff rests.

The Court: Ladies and Gentlemen of the Jury, we will recess until 2:00 p.m.

(Jury duly excused.)

The Court: You may now renew your motion if you so desire. Is it understood the record will show your motion?

Mr. Marcus: Yes, your Honor; with special emphasis in line with the evidence which has been introduced by the plaintiff in this case in addition to the grounds stated in the Wuthrick case.

The Court: All right.

Mr. Marcus: Comes now the Shell Oil Company, the defendant in this action and moves the involuntary dismissal of the action and complaint of the plaintiff upon the ground and for the reasons that it is shown here by the evidence that this oil well drilling was being performed by the Rocky Mountain Oil Corporation, a corporation which is entirely separate and distinct and totally unrelated to the Shell Oil [147] Company, this defendant, and that under the terms of the contract which is admitted in evidence here, the Rocky Mountain Oil Corporation was an independent contractor in the performance of this work and that the Shell Oil Company was in no way responsible for the acts of negligence, if any, of the Mr. Doman who is allegedly the person who caused this unfortunate occurrence. As a further ground, your Honor, the evidence shows clearly that at the particular time of this occurrence the Shell Oil Company had nothing to do with this work. There was nobody, no representative of Shell

who was present or participating in the work that was going on at the particular time of this occurrence, and the principle is very clear that in order to render a person liable for injuries under the doctrine of respondent superior, the relationship of master and servant must be shown to have existed between the wrongdoer and the person sought to be charged at the time of the injury, and in reference to the very act complained of. Here the evidence shows that even the geologist who was there to obtain the geological information had nothing to do with the work until subsequent to the time of this occurrence, so the entire question here is based upon the contract arrangement between Shell and the Rocky Mountain Oil Corporation, and it is up to the Court to determine what the relationship was that existed. It is our position, your Honor, that clearly there was an independent contract relationship here, and for that reason we move the dismissal of the action and move for a nonsuit on behalf of this defendant. [148]

The Court: The record may show the motion is denied.

Mr. Zener: I think we can state for the purpose of the record that it has been agreed between counsel and the Court that certain exhibits heretofore introduced in evidence in the Wuthrick case may be withdrawn from that case. They are designated in the Wuthrick case as exhibits 8 through 13.

Mr. Aadnesen: We will stipulate as to all of them, of course without waiving our objection as to admissibility if any was made.

The Court: We will now recess.

2:00 P.M.

The Court: You may proceed with the defendant's case.

(Mr. Marcus made his opening statement.)

Mr. Marcus: Your Honor, we would offer in evidence what is marked Defendant's Exhibit 15, being a certified copy of a lease, oil and gas lease issued to G. W. Anderson on April 29, 1954.

Mr. Zener: We object only on the ground the exhibit is immaterial and irrelevant.

The Court: It may be admitted. [149]

LOREN McINTYRE

having been previously sworn, testified as follows, upon

Direct Examination

By Mr. Marcus:

Q. Mr. McIntyre, you testified in this case here this morning, did you not? A. Yes; I did.

Q. Now, calling your attention to the morning of June 1, 1954, about what time did you get out to the drilling site? A. About six that morning.

Q. Did you know the individuals who were present at that time? A. No; I did not.

Q. Were there some individuals around there at that time?

A. I beg your pardon, on the other question I knew Mr. Robinson but I did not see him that morning as he was asleep in the truck.

Q. When you arrived out there was the fire

(Testimony of Loren **McIntyre.**)

burning in the barrel? A. Yes; it was.

Q. And did it continue? Did they keep the fire going until Mr. Wuthrick and Prestidge came up to the fire? A. They did.

Q. Now, where were you standing at the time Mr. Wuthrick and Mr. Prestidge came up [150] there? A. I was standing beside the fire.

Q. Do you know the employee of the Rocky Mountain Oil Corporation who later poured the diesel on the fire? A. I did not.

Q. Where was he standing at the time that you went up there?

A. I believe he was not near the fire but over by the rig some place.

Q. Later did he approach the fire and stand by it? A. Yes; he did.

Q. Where were you standing when Mr. Wuthrick and Mr. Prestidge came up to the fire?

A. By the fire.

Q. Was it quite cold that morning?

A. It was.

Q. And did you observe the employee of the Rocky Mountain Oil Corporation pour the diesel on the fire? A. Yes; I did.

Q. At the time the accident occurred?

A. Yes.

Q. Now, where were you standing at that time?

A. I was standing beside the fire, between the fire and the rig.

Q. And where were Mr. Prestidge and Wuthrick?

(Testimony of Loren McIntyre.)

A. They were on the opposite side of the fire.

Q. And did they remain there until the diesel was poured [151] on the fire?

A. Yes; they did.

Q. Both of them remained on the opposite side of the fire? A. Yes.

Q. And how close to the fire were they?

A. Two or two and a half feet.

Q. Did either of them move back or walk away from that place as Mr. Doman, the employee of Rocky Mountain——

Mr. Zener: Would you please not lead the witness? I object to the last question.

The Court: Objection sustained.

Q. Can you tell the court and jury what happened and where Mr. Prestidge and Mr. Wuthrick were standing up to the time this accident occurred?

A. They were standing on the opposite side of the fire from myself—what was the entire question?

(Reporter read the pending question.)

A. They were standing on the opposite side of the fire and just directly across from it, about two or two and a half feet from the fire.

Q. Did they at any time change their positions up to the time of this actual occurrence?

A. No.

Q. And they remained standing within two or two and a half feet of the fire? [152]

Mr. Zener: I object on the ground these questions are all leading.

(Testimony of Loren McIntyre.)

The Court: Yes; they are. Objection sustained.

Q. Do you know whether or not Mr. Wuthrick and Mr. Prestidge observed Mr. Doman as he poured the diesel on the fire?

Mr. Zener: Object on the ground it could not be within this man's knowledge.

The Court: Objection sustained.

Q. In what direction were they looking at the time the diesel was poured?

A. Across the fire at myself and Mr. Doman.

Q. Did either of them at any time object to——

A. No; they did not.

Q. To the action of Mr. Doman?

A. No; they did not.

Cross-Examination

By Mr. Zener:

Q. You did see Mr. Prestidge struck with the flame or catch on fire there; didn't you?

A. At the time of the explosion I turned around and stepped away from the fire and the next time I saw Mr. Prestidge is when he ran by.

Q. Then you don't know just where he was standing at the time of the explosion; is that [153] right?

A. The time they poured the oil he was standing directly across.

Q. What did Mr. Prestidge do after this explosion?

A. As I say, the next time I saw him was when

(Testimony of Loren McIntyre.)
he ran by and Mr. Doman then tackled him and threw him to the ground.

Q. How did he appear when you saw him running by you? A. He was on fire.

Q. He was on fire almost from head to foot, wasn't he?

A. Well, his lower extremities he—were on fire. I wouldn't say to the extent.

Q. He seemed to be in panic to you?

A. Yes; he appeared that way; yes.

Q. What did this man Doman have to do in order to stop him?

A. He grabbed ahold of him and wrestled him to the ground.

Q. What did he do then?

A. He proceeded to smother the fire.

Q. Did you observe Mr. Prestidge after the fire was smothered?

A. I saw him for a few seconds while they were putting him in the car; yes.

Q. Did you observe hs body and the extent of his burns?

A. He had his clothing on and it was difficult to say.

Q. Was his clothing burned to any extent?

A. Charred around the ankles and wrist. [154]

Q. How about around his knees?

A. Well, his pants covered his knees so I couldn't tell.

Q. Wasn't charred around his knees?

(Testimony of Loren McIntyre.)

A. Not that I observed.

Q. How about his hands, wrist and face; did you observe anything about those?

A. I didn't look quite that close. As I say, they were charred around the edge of his clothing.

Q. Did he appear to be in pain?

A. Well, yes.

Q. Did he cry out?

A. A—not at that time; no.

Q. Did he at any time?

A. Well, when he went by the first when he was on fire, yes; he was crying out.

Q. After the fire had been extinguished and they loaded him in this vehicle did he say anything then?

A. Well, I wasn't that close.

Q. How far would you say this Mr. Doman threw or poured this diesel oil into this open fire, was there some distance between him and the fire?

A. No; not too much.

Q. Did it concern you when you saw he was going to throw this oil in an open fire?

A. As he was doing it; yes. I thought he was going to pour it in an open can as he did previously when he first picked up the closed can. [155]

Q. Did you step back; were you alarmed or concerned?

A. There wasn't quite that much time.

Q. I take it you acted rather rapid when he did this?

A. He had the open can close to the fire, the open can, and he went and picked up the closed can

(Testimony of Loren McIntyre.)

which he had been pouring the oil in the open can and came up to the fire and instead of pouring it in the open can he poured it from the closed can upon the fire.

Q. It caused an almost immediate explosion?

A. Fairly soon.

Q. Covering some considerable area immediately around that fire?

A. Well, I couldn't verify what area it covered because I turned around and stepped out away from the fire.

Q. Did you hear anything that would denote an explosion or any sound?

A. Yes; there was a low explosion.

Mr. Zener: That is all.

Mr. Marcus: That is all. We rest, your Honor.

Mr. Zener We have no rebuttal.

The Court: I will excuse the jury for a few moments.

(Jury duly excused.)

Mr. Marcus: May the record at this point show our motions for dismissal and for directed verdict as in the Wuthrick case? [156]

The Court: Yes.

Mr. Marcus: Your Honor, comes now the defendant, Shell Oil Company, and moves that the action and the complaint of the plaintiff against the Shell Oil Company herein be dismissed upon the ground and for the following reasons: That the evidence now shows that Shell Oil Company is in no way

legally responsible and liable for the accident to Mr. Prestidge and the resulting injuries and was not and is not legally responsible and liable for any acts of negligence, if there were any, of Mr. Doman referred to in the testimony. That the evidence shows that the well and the work at the time of this accident was being carried on by the Rocky Mountain Oil Corporation under an independent contract, and was acting in the capacity of an independent contractor in the performance of such oil well drilling and the related work. That the evidence shows without contradiction that Shell Oil Company did not bear the relationship of principal to the Rocky Mountain Oil Corporation or to the said employee of Rocky Mountain Oil Corporation at the time of such occurrence. Upon the further ground that the evidence shows that the relationship of these parties, Rocky Mountain Oil Corporation and the Shell Oil Company must be determined from the written instrument in evidence here and that those instruments show that the Shell Oil Company and Rocky Mountain Oil Corporation were not principal and agent, master or servant, and were not engaged in a joint adventure at that [157] particular time.

Upon all such grounds we also move that the Court, under Rule 50, direct a verdict in behalf of the Shell Oil Company and against the plaintiff, both motions being based upon the further ground, your Honor, that the evidence in this action shows as a matter of law that if there was negligence on the part of the employee mentioned, the plaintiff was also guilty of contributory negligence.

The Court: I am going to deny the motion to dismiss and reserve my decision on the directed verdict.

(A recess was then taken.)

2:30 P.M.

(The case was then argued by the respective parties.)

(The Court then instructed the jury as follows:)

INSTRUCTIONS TO THE JURY

Ladies and Gentlemen of the Jury:

You have listened intently to the evidence and the argument of counsel in this case, and if I may have your attention for a short time I will advise you as to the principles of law applicable in this matter, by which you must be guided in your deliberations. It is your duty to accept these instructions as correct and, so far as the law in the case is concerned, to be guided by them. It is the Court's responsibility to decide all questions of law. It is likewise your responsibility to decide all questions of fact, and the Court cannot be of assistance to you in that [158] regard.

In this action the plaintiff seeks to recover the sum of $1,800 as special damages and the sum of $100,000 as general damages. The plaintiff alleges in his complaint that on or about June 2, 1954, defendant Shell Oil Company was engaged in oil well

drilling operations near Montpelier, Idaho; that on the said date he was on the defendant's premises at the latter's invitation, and was burned about the face and body as a direct proximate result of an explosion caused by defendant's negligent action in pouring oil upon an open fire; that since receiving said injuries he has been unable to perform his usual manual labor, and thereby suffered loss of earnings and has become liable for medical services and supplies in the sum of $1,800; and that he has suffered, and will continue to suffer, mental and physical pain as a result of the permanent and serious nature of his injuries. The defendant has filed an answer wherein it makes certain denials and certain affirmative allegations.

This is an action for negligence against the defendant Shell Oil Company. The said defendant defends upon the ground that it was not negligent, and, by way of an affirmative defense, upon the further ground of contributory negligence on the part of the plaintiff.

In determining this case you should first concern yourself with determining whether the defendant was guilty [159] of the alleged negligence which was the proximate cause of the damages sustained by the plaintiff, and if you do not find that the plaintiff has proved such negligence by a preponderance of the evidence, then you should find for the defendant without considering the matter further.

If you should find, however, that negligence on the part of the defendant was the proximate cause

of the injuries, if any, sustained by the plaintiff, then your verdict should be for the plaintiff, unless you find that the injuries, if any, complained of by the plaintiff were contributed to by negligence on the part of the plaintiff.

Negligence is never presumed and it cannot be inferred or presumed that either the defendant or the plaintiff was negligent from the mere fact that an accident occurred. The burden is upon the plaintiff to establish the material allegations of his complaint by a preponderance of the evidence. The mere charges of negligence in the complaint are not evidence, but the plaintiff has the burden of establishing by a preponderance of the evidence one or more of the charges of negligence alleged in the complaint, and that such negligence, if any, was the proximate cause of the injuries sustained.

The burden is upon the plaintiff in the first instance to establish by a preponderance of the evidence the claim for relief set forth in his complaint.

By a preponderance of the evidence I do not necessarily [160] mean the greater number of witnesses on a material point, but rather the greater weight of the evidence; that is, that evidence which when fairly, fully and impartially considered by you produces the stronger impression and is more convincing as to its truth or correctness when contrasted or weighed against the evidence in opposition thereto.

Likewise, the burden rests upon the defendant to prove by a preponderance of the evidence that the plaintiff was guilty of the contributory negligence which it has charged.

While it is incumbent on the plaintiff to prove his case by a preponderance of the evidence, the law does not require of the plaintiff proof amounting to demonstration or beyond a reasonable doubt. All that is required in order for plaintiff to sustain the burden of proof is to produce such evidence which, when compared with that opposed to it, carries the most weight, so that the greater probability is in favor of the party upon whom the burden rests.

Negligence is the omission to do something which an ordinary prudent person would have done under the same circumstances or doing something which such person would not have done under the same circumstances.

Contributory negligence, which has been asserted as a defense in this case, is defined as an act or omission by the plaintiff amounting to a want of ordinary care for [161] his own safety, which is the proximate cause of his injuries though concurrent with some negligent act of the defendant.

If you believe from the evidence in this case that the plaintiff's injuries, if any, were caused in part by the negligence of the defendant, but that the plaintiff at the time and place of the accident failed to exercise that degree of care that an ordinary reasonably prudent person would exercise under the same or similar circumstances, and that such failure on the part of the plaintiff proximately contributed to cause his injuries, then the plaintiff cannot recover, and you must find for the defendant.

The burden of proving this defense of contributory negligence is on the defendant. You may, how-

ever, consider the evidence adduced on the part of the plaintiff in determining whether or not the plaintiff was contributorily negligent and whether that negligence continued up to the time of, and proximately contributed to, his injuries.

The proximate cause of any injury is a cause which in its natural and continuous sequence, unbroken by any new cause, produces an event, and without which the event would not have occurred. But in order to warrant a finding that the negligence is the proximate cause of the injury it must appear from the evidence that the injury was the natural and probable consequence of the negligence and ought to have been foreseen as likely to occur by a person of ordinary prudence in the light of the attending circumstances. [162]

There must be a direct causal connection between the negligence of the defendant and the injuries to the plaintiff. In this case the negligent acts of the defendant, if any, must be the proximate cause of the plaintiff's injuries, if any, in order that the plaintiff may recover.

By the phrases "reasonable care" or "ordinary care," as used in these instructions, is meant the exercise of that care and caution as would be exercised by a reasonably prudent person under the same or similar circumstances.

"Ordinary" or "reasonable" care are relative terms, and such care is proportionate to, and commensurate with, the danger involved; in other words, the greater the danger involved, the greater is the care required, although there is but one stand-

ard of care, and that is reasonable or ordinary care.

You cannot return a verdict for the plaintiff in this case, if, in order to do so, it is necessary to resort to mere conjecture or speculation. Neither can you find a verdict for the plaintiff merely because an accident occurred, or because the plaintiff was injured. Before finding a verdict for the plaintiff you must believe from a preponderance of the evidence and as a fair inference from the evidence adduced that the defendant was guilty of negligence and that the plaintiff suffered injuries that were the proximate result of such negligence. [163]

In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill, or caution, still, no one may be held liable for injuries resulting from it.

A person who invites another to come upon his premises upon a business in which both are concerned is bound to take care that his premises and all appliances provided by the owner as incidental to the use of his premises are safe for that other person to come upon and use them as required, or else to give due warning of any danger to be avoided.

It is the imperative and sworn duty of the jury to hear and determine this case precisely the same as if it were between two individuals. You should

return a verdict according to the facts established by the evidence introduced during the trial and the law as laid down by the Court, without reference to the individual character of the plaintiff or the corporate business or character of the defendant.

You should require as much evidence to find an issue against a corporation as you would against an individual. A corporation is entitled to the same protection of the [164] law as is an individual. Sympathetic feelings have no place whatever in the trial of a case in a court of justice. You should disregard all such influence and determine this case according to the law and the evidence given you in open court regardless of who the parties are, and with fairness and impartiality.

A corporation is an artificial person, a creature of the law. It must necessarily act through its servants, agents and employees. An act of an employee within the scope of his employment, or within the course of his employment, is an act of his employer, and the negligence of the employee in the performance of his duties is the negligence of the employer.

In order for the plaintiff to recover against the defendant Shell Oil Company in this action, he must establish by a preponderance of the evidence either that Rocky Mountain Oil Corporation was an agent of Shell Oil Company at the time of the accident here in issue, or that Rocky Mountain Oil Corporation and Shell Oil Company were engaged in a joint adventure at the said time. In determining the relationship between the Shell Oil Company and the Rocky Mountain Oil Corporation you may take into

consideration all of the provisions and conditions of the writings between them and all other evidence in this case.

"Agency" is the relationship resulting from the manifestation of consent by one to another that the other shall act on his behalf and subject to his control and consent by the other so to act. The relationship of "principal and agent" need not necessarily involve some matter of business, but, where one undertakes to transact some business or manage some affair for another by authority and on account of such other person, the relationship arises, irrespective of existence of a contract or receipt of compensation by either party.

In determining whether or not the relationship of principal and agent existed between the Shell Oil Company and Rocky Mountain Oil Corporation, or whether the Rocky Mountain Oil Corporation was conducting drilling operations as an independent contractor, you must look to the character of the control exercised by the Shell Oil Company. If Shell Oil Company retained the right not only to direct what should be done, but also how it should be done, in all substantial particulars, and reserved, in practical effect, power to subject Rocky Mountain Oil Corporation to its will and direction in the course of the conduct of the drilling referred to, the relationship was that of principal and agent.

A joint adventure is generally a relationship analogous to but not identical with a partnership, and is often defined as an association of two or more persons to carry out a single business enterprise

with the objective of realizing a profit. To constitute a joint adventure the parties may combine their property, money, efforts, skill or knowledge in some common undertaking, and their contribution in this respect need not be equal or of the same character, but there must be some contribution by each joint adventurer of something promotive of the enterprise; and even though one adventurer owns all the property used in the joint adventure, this is not conclusive in determining whether such relationship exists. In a joint adventure there must be agreement to enter into an undertaking between parties having a unity of interest in the objects or purposes of the agreement, and a common purpose in its performance; while a provision for sharing losses is important in construing an agreement for a joint adventure, it is not essential, and neither an agreement to share profits nor losses is conclusive in the construction of the contract, but the intention of the parties controls.

If you find from the evidence in this case that there was such a joint adventure existing between Shell Oil Company and the Rocky Mountain Oil Corporation at the time of the accident, and you further find that there was negligence on the part of the employees of Rocky Mountain Oil Corporation which was the proximate cause of plaintiff's injuries, if any, then you may find the Shell Oil Company liable in damages for the result of the said negligence.

Or, if you find that a principal and agent relationship existed between Shell Oil Company and

Rocky Mountain Oil [167] Corporation at the time of the said accident, and you further find that there was negligence on the part of the employees of Rocky Mountain Oil Corporation which was the proximate cause of plaintiff's injuries, if any, then you may find the Shell Oil Company liable in damages for the result of the said negligence.

On the other hand, however, if you find that the Rocky Mountain Oil Corporation was not an agent of Shell Oil Company at the time of the said accident, and if you also find that Rocky Mountain Oil Corporation and Shell Oil Company were not joint adventurers at the said time, then you must find for the defendant Shell Oil Company, and against the plaintiff.

Certain witnesses have been called here, commonly referred to as expert witnesses, and insofar as the testimony of the expert witnesses is concerned you will consider that and treat it in the same manner as you would treat any other testimony in the case. The fact that it was offered by experts does not compel you to take their testimony in preference to any other, but you should give the testimony of the expert witnesses the same weight, the same consideration, everything else being equal, as that of any other witness. The value of an expert's opinion depends not only upon the qualifications and experience of the witness, but also upon the facts which he takes into consideration and upon which he bases his opinion. [168]

In passing upon the questions of fact in this case,

you will determine the credibility to be given the testimony of each witness and you have a right to take into consideration his interest, if any, in the result of the case, his demeanor on the witness stand, his candor or lack of candor, and all other facts and circumstances which could influence you in determining whether or not a witness has told the truth. You will determine the weight to be given to the testimony of each witness called to the stand.

If you believe from the evidence that any witness has wilfully sworn falsely in his testimony in this trial, regarding any material matter testified to by such witness, then you may totally disregard the testimony of such witness except insofar as he is corroborated, to your satisfaction, by other and credible evidence, or by facts and circumstances proved on the trial.

In determining questions of fact you are not at liberty to follow your own ideas of what the law is or ought to be. You should, on the contrary, look solely to the evidence for the facts and to the instructions given you for the law, and return a verdict according to the facts established by the evidence and the law as given you by the Court.

You should not take any particular statement or any particular portion of the instructions and consider that as being the entire law of the case, and you should not [169] place any undue emphasis on any particular portion of the instructions. You should consider the instructions given you as a whole, and when so considered you should apply them to the facts submitted to you.

You should disregard any statements of counsel for either side, if any were made during the trial or the argument in the case, which are contrary to or not in accord with your recollection of the evidence, and you will also disregard all evidence which may have been offered by either side and not admitted in evidence. It is also your duty to disregard any evidence which may have been ordered stricken from the record.

If, after deliberating on this matter, you determine that the plaintiff is entitled to recover, you should determine the amount to which he is entitled by an open and frank discussion among your members and you should not arrive at any amount to be allowed by each stating the amount you think should be allowed, then adding the several amounts together and dividing the total by twelve or by the number taking part in such method. This would be a quotient verdict and you should not, under your oath as jurors, arrive at any such verdict.

If from the evidence admitted during this trial and under the instructions given you by the Court you find the issues for the plaintiff, then in order to enable you to estimate the amount of such damages as you may allow for pain and suffering, it is not necessary that any of the witnesses should have expressed an opinion as to the amount of such damages, if any. You may estimate such damages from the facts, circumstances and evidence and by considering them in connection with your own knowledge and experience in the affairs of life. With regard to pain and suffering the law pre-

scribes no definite measure of damages, but leaves such damages to be fixed by you as your discretion dictates and as under all the circumstances may be just, reasonable and proper, not exceeding the amount prayed for in the complaint.

If you find that the plaintiff is entitled to recover you may award him such damages, within the amount claimed, as in your opinion will compensate him for the pecuniary damages proved to have been sustained by him and proximately caused him by the wrong complained of. You may consider the physical and mental pain suffered, if any, by the plaintiff. You may also consider such impairment, if you find any, with reference to the plaintiff's physical condition and such pain, if any, as plaintiff will suffer in the future, as a result of this accident. You may also consider the amount or amounts that he necessarily paid out for the expenses that were incurred for medical care. You may further consider the reasonable value of time lost, if any, by plaintiff, wherein he has been unable to pursue his occupation. [171]

The fact that you are instructed as to the measure of damages under the law in this case is not to be taken by you as an indication that the Court believes or does not believe that the plaintiff is entitled to recover. It is the duty of the Court to instruct you upon the entire law of this case and therefore the instructions upon the measure of damages are to guide you in the amount of damages to be awarded in the event, and only in the event, that you find the plaintiff is entitled to recover at all.

The Court has heard it suggested that jurors sometimes scrutinize instructions of the Court with a view of ascertaining therefrom the personal opinion of the Court upon the merits of the case. The Court has no power to charge you upon the facts or either directly or indirectly indicate to you its view upon the merits. It is the duty of the Court to charge you upon the law only, and as jurors sworn to try the cause upon the law and the evidence, you have no right to assume that the Court has any views as to the verdict that should be arrived at as the result of your deliberations in this case, and you must enter your deliberations with the understanding that the Court has no opinion or idea as to what your verdict should be.

You should not consider or in any way or to any extent be influenced or controlled by the remarks or statements of the Court in replying to questions or in replying to statements of counsel on either side, or by any remarks or statements of the Court in ruling upon the admissibility of evidence or to evidence offered but not received or evidence ordered stricken from the record by the Court. Your verdict should be based upon the evidence admitted upon the trial and the instructions of the Court applicable thereto and upon nothing else.

In this Court it is necessary that you all agree in arriving at a verdict. When you retire you will first elect one of your number as foreman and when you have agreed on a verdict your foreman alone will sign the verdict. Forms of verdict have been prepared for your use and you will have no trouble

in using the form which will correctly reflect your findings.

One form contains a blank space for the amount of damages you will allow if you find in favor of the plaintiff and against the defendant. In the other form there is no blank space and this, of course, is the form you will use if you find for the defendant.

When you arrive at a verdict it will be returned into open court.

I will excuse you for a moment while I take up a matter of law with counsel. [173]

Mr. Coughlan: We have no exceptions.

Mr. Marcus: May it be stipulated that the reporter may copy the exceptions and objections that were made to the instructions and the failure to instruct as were made in the Wuthrick vs. Shell Oil case, and in addition we object to the failure of the Court to give our requested instructions one through nine.

The Court: Very well.

EXCEPTIONS AND OBJECTIONS TO INSTRUCTIONS

Mr. Marcus: We except and object to the instructions and to the failure to instruct as follows: The failure of the Court to direct a verdict for the defendant. The failure of the Court to interpret the written contracts that have been introduced here between the Shell Oil Company and the Rocky Mountain Oil Corporation, and to instruct the jury

as to the effect of those contracts and the relationship created, as well as failure to interpret the other written instruments submitted in the case, and instruct as to their legal effect. We also object and except, your Honor, to the instruction of the Court leaving the interpretations of the contracts up to the jury. We think that is a law question that the jury should be instructed on by the Court. We also except and object to the instruction to the jury that they may consider the contracts in determining the relationship and all other evidence in the case with respect to control of the Shell Oil Company upon the ground that there was no evidence showing any control over and beyond the contract terms at the particular time of this occurrence. We except, your Honor, to the instructions on joint adventure and principal and agent, leaving those questions up to the jury for determination and we except and object to the instructions given with respect to the definition of joint venture and principal and agent for the reason that they are incomplete, that they are not accurate statements of the law of this state and applicable to this case. We also object and except to the definition of agency contained in the instructions of the Court. We especially object to the definition of venture as given by the Court in failure to point out to the jury all of the essential elements of such joint venture, and failing to instruct the jury as to the extent of control necessary in a joint venture and the extent of ownership, the sharing of profits and losses. We especially object to the principal and agent instruction for the reason

that it does not define the extent of control that must be found before liability is imposed on an agent, especially in failing to specify that there must be control over the manner and means of the performance of the work or activity that is subject to the instruction. We also object and except to the instruction with respect to the duty of owner of premises to invitees upon the ground that the evidence shows that Shell Oil Company had no ownership or title in the premises where the accident occurred. That is all. [175]

The Court: The exceptions will be noted. You may call the jury.

(Jury duly called and bailiffs sworn.)

The Court: You may now retire to consider your verdict. [176]

State of Idaho,
County of Ada—ss.

I, Dwight K. Wells, hereby certify that I am an official Court Reporter for the United States District Court for the District of Idaho, and

I further certify that I am the person who took the proceedings had in the above-entitled hearing in shorthand and thereafter transcribed the same into typing and

I further certify that the foregoing transcript is a true and correct transcript of said matter.

In witness whereof I have hereunto set my hand this 1st day of November, 1956.

/s/ DWIGHT K. WELLS,
Court Reporter.

[Endorsed]: Filed November 9, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP) to wit:

1. Complaint.
2. Motion for Designation of Sheriff to Serve Summons, etc.
3. Order for Service by Sheriff.
4. Summons with return thereon.
5. Affidavit of Service.
6. Motion of Stony Point Development to Dismiss.
7. Motion of Shell Oil Co. for More Definite Statement.
8. Stipulation for hearing Motion for More Definite Statement.

9. Minutes of the Court of March 15, 1956.

10. Answer of Shell Oil Company.

11. Affidavit and Notice of Withdrawal of Attorney G. Staudacher for Rocky Mountain Oil Corporation.

12. Affidavit and Notice of Withdrawal of Attorney G. Staudacher for Stony Point Development Co.

13. Notice to Appiont Attorney or Appear in Person—Rocky Mountain Oil Corporation.

14. Notice to Appoint Attorney or Appear in Person—Stony Point Development Co.

15. Affidavit of Mailing of Notices.

16. Copy of Letter, Glenn A. Coughlan to Claude Marcus dated June 1, 1955.

17. Answer to Rocky Mountain Oil Corporation.

18. Stipulation and Order of Dismissal of Stony Point Development, Inc.

19. Request for Admissions (Plaintiff's Exhibit 8—with exhibits).

20. Interrogatories by Plaintiff.

21. Answer to Interrogatories by Rocky Mountain Oil Corp.

22. Minutes of the Court of October 5, 1955.

23. Requested Instructions by Shell Oil Company.

24. Verdict.

25. Minutes of the Court of October 6, 1955.

26. Judgment.

27. Reporter's Transcript.

28. Notice of Time and Place of Taxation of Costs.

29. Memorandum of Costs against Shell Oil Co.

30. Affidavit of Mailing of Cost Bill against Rocky Mountain Oil Co.

31. Notice of Time and Place of Taxation of Costs.

32. Memorandum of Costs against Rocky Mountain Oil Co.

33. Motion of Shell Oil Co. for Judgment in Accordance with Motion for Directed Verdict, or for New Trial.

34. Order Granting Motion of Shell Oil Co. for Judgment in Accordance with Motion for Directed Verdict.

35. Judgment Vacating Judgment against Shell Oil Co.

36. Memorandum of Costs of Shell Oil Co.

37. Notice of Time and Place of Taxation of Costs.

38. Motion for New Trial.

39. Affidavit of Clarence S. Robinson.

40. Affidavit of Edmund W. Windolph.

41. Affidavit of Glenn A. Coughlan.

42. Supplemental Motion for New Trial.

43. Minutes of the Court of April 6, 1956.

44. Motion for Extension of Time and Permission to File Counter Affidavits, with Attached Affidavits.

45. Objection to Motion for Extension of Time in Permission to File Counter Affidavits.

46. Affidavit in Opposition to Motion for Extension of Time and Permission to File Counter Affidavits.

47. Motion to Strike from the Files.

48. Order Granting New Trial.

49. Notice to Take Deposition of Dr. R. B. Lindsay.

50. Motion for Summary Judgment.

51. Motion to Postpone Trial of Case (Affidavit of Claude Marcus attached).

52. Supplemental Order Granting Motion for New Trial as to Shell Oil Company.

53. Minutes of the Court of May 21, 1956.

54. Motion in Opposition to Defendant's Motion for Summary Judgment.

55. Notice of Filing of Deposition of Dr. Rulon B. Lindsay.

56. Defendant's Requested Instructions.

57. Minutes of the Court of May 24, 1956.

58. Verdict.

59. Minutes of the Court of May 25, 1956.

60. Judgment for Plaintiff.

61. Motion of Shell Oil Co. for Judgment in Accordance with Motion for Directed Verdict, or for New Trial.

62. Memorandum of Costs of Plaintiff.

63. Notice of Time and Place of Taxation of Costs.

64. Minutes of the Court of July 26, 1956—Denying Motion for New Trial.

65. Notice of Appeal.

66. Undertaking on Appeal.

67. Designation of Contents of Record on Appeal.

68. Statement of Points upon which Appellant Intends to Rely on Appeal.

69. Motion for Order Extending Time to File Record and Docket Cause.

70. Order Extending Time to File Record and Docket Cause.

71. Exhibits Nos. 7, 9, 10, 11 and 12 admitted during first Trial on October 5, 1955, and not offered at second Trial.

72. Exhibits Nos. 1 to 15 inclusive, admitted at second trial.

In Witness Whereof I have hereunto set my hand and affixed the seal of said court this 9th day of November, 1956.

[Seal] ED. M. BRYAN,
Clerk,

By /s/ LONA MANSER,
Deputy.

[Endorsed]: No. 15365. United States Court of Appeals for the Ninth Circuit. Shell Oil Company, a Corporation, Appellant, vs. Lanus Wayne Prestidge, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Eastern Division.

Filed November 12, 1956.

Docketed: November 23, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15365

SHELL OIL COMPANY, a Corporation,

Appellant,

vs.

LANUS WAYNE PRESTIDGE,

Appellee.

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Appellant herewith submits a statement of the points upon which it intends to rely on appeal.

(1) The error of the trial court in refusing to grant the motion to dismiss made by appellant prior to the trial and in refusing to grant the motion for directed verdict made by appellant at the close of evidence in the first trial of this cause and refusal to grant the motion for directed verdict made by this appellant at the close of the evidence at the second trial.

(2) The error of the trial court in refusing to grant the motion for directed verdict of this appellant.

(3) Error of the court in granting the motion of plaintiff for new trial based on newly discovered evidence after the trial court had granted the mo-

[Title of Court of Appeals and Cause.]

STIPULATION THAT EXHIBITS NEED NOT BE PRINTED

It is stipulated and agreed between the parties hereto that none of the exhibits in this case need be printed in the record, but that said exhibits may be considered and referred to by the court and counsel as though contained in the printed record on appeal.

Dated November 20, 1956.

/s/ CLAUDE MARCUS,

/s/ BLAINE F. EVANS,

/s/ GRANT C. AADNESEN (C.M.)
Attorneys for Appellants.

/s/ GLENN A. COUGHLAN,
Attorney for Appellee.

[Endorsed]: Filed November 23, 1956.

No. 15365

IN THE

United States
Court of Appeals

For the Ninth Circuit

SHELL OIL COMPANY, a Corporation,

Appellant,

vs.

LANUS WAYNE PRESTIDGE,

Respondent.

BRIEF OF APPELLANT

CLAUDE V. MARCUS
Boise, Idaho
BLAINE F. EVANS
Boise, Idaho
GRANT C. AADNESEN
Salt Lake City, Utah
Counsel for Appellant

FILED

IN THE

United States
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SHELL OIL COMPANY, a Corporation,

Appellant,

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Respondent.

BRIEF OF APPELLANT

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Boise, Idaho
BLAINE F. EVANS
Boise, Idaho
GRANT C. AADNESEN
Salt Lake City, Utah
Counsel for Appellant

SUBJECT INDEX

POINT 1

In this case plaintiff had duty of proving that Shell Oil Company was liable for the acts of the employee of Rocky Mountain Oil Corporation.

POINT 2

In the performance of the oil well drilling operations under contract with Shell Oil Company, the Rocky Mountain Oil Corporation was an independent contractor and therefore Shell Oil Company was not liable for the negligence, if any, of the employee of Rocky Mountain Oil Corporation.

POINT 3

Liability for the acts of another under the rule of respondent superior attaches only when the relation of master and servant or principal and agent is shown to exist between the wrongdoer and person sought to be charged with liability for the wrong, at the time of the injury and in respect of the very transaction out of which his injury arose.

POINT 4

The written Contract between Rocky Mountain Oil Corporation and Shell Oil Company is clear and

unambiguous in its terms and therefore the construction of the contract was a question of law for the court and it was error to submit such question to jury determination.

POINT 5

The instructions given by the trial court were erroneous and prejudicial. There was no evidence showing that Shell Oil Company and Rocky Mountain Oil Corporation were engaged in a joint venture and submitting that and other questions to the jury was error.

POINT 6

The court committed error in the rejection and admission of evidence submitted in the trial of this case.

TABLE OF CASES

IN THE

United States
Court of Appeals

For the Ninth Circuit

SHELL OIL COMPANY, a Corporation,

Appellant,

vs.

LANUS WAYNE PRESTIDGE,

Respondent.

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This action is between citizens of different states involving more than $3,000.00, filed in the United States District Court for the District of Idaho, Eastern Division, and therefore within the jurisdiction of said court. Under the provisions of Section 1332, Title 28, U.S.C.A., the instant appeal is taken from a final judgment entered in said court and therefore within the jurisdiction of this court under the provisions of Section 1291, Title 28, U.S.C.A.

The complaint of the Plaintiff was filed in the Dis-

trict Court on January 6, 1955. Appellant, Shell Oil Company, a Corporation; Rocky Mountain Oil Corporation, a Corporation; and Stony Point Development, Inc., a Corporation, were named as defendants. Subsequently Stony Point Development, Inc. was dismissed from the action by stipulation. Judgment in the case has become final as against Rocky Mountain Oil Corporation and said corporation is not a party to this appeal. Hereinafter Shell Oil Corporation will be referred to as "Shell," and Rocky Mountain Oil Corporation will be referred to as "Rocky Mountain."

In this case the plaintiff sued to recover damages for personal injuries allegedly suffered by the Plaintiff on or about June 1, 1954, at an oil well drilling site near Montpelier in Bear Lake County, Idaho. At that time the Rocky Mountain Oil Corporation was conducting such drilling operations at said site located in Lot 2, Section 30 Township 12 South, Range 46 East B. M. in Bear Lake County, Idaho. The Plaintiff, accompanied by a companion, allegedly left Montpelier, Idaho, early on the morning of June 1, 1954 and drove to the drilling site to inquire about employment, arriving before work had started on the morning shift. The employees of Rocky Mountain who were at the job site had started a warming fire near the operation for the purpose of warming themselves before beginning work. Plaintiff and his companion approached the fire and stood close to it. At that time an employee of Rocky Mountain picked up a can of diesel oil and poured some on the burning fire. This apparently resulted in fire being splashed

on the Plaintiff who allegedly suffered burns which resulted in his action for damages.

The drilling site of these operations was located on government land and had originally been leased from the government under an oil and gas lease by one Ragner Barhaug on February 1, 1949. On January 11, 1951, Barhaug assigned his lease to Shell Oil Company. The Barhaug lease is Plaintiff's Exhibit 10 of the record in this case. On December 26, 1952, Shell entered into a "farm out" agreement with Wheeler and Gray, a partnership, under the terms of which Wheeler and Gray contracted to drill a well on said Lot 2, Section 30, Township 12 South, Range 46 East B. M. The Wheeler and Gray agreement with Shell is Plaintiff's Exhibit 11 of the record in this case. On March 6, 1953, Wheeler and Gray assigned their contract with Shell to Rocky Mountain Oil Corporation, and on July 15, 1953, Shell recognized such assignment and executed an assignment and agreement with Rocky Mountain under the terms of which Rocky Mountain assumed the Wheeler and Gray contract to drill said well. Rocky Mountain was engaged in drilling such well at the time of the alleged occurrence which gave rise to this action.

Through failure to pay the rent on said Lot 2 the lease on this property with the government expired February 1, 1954 and thereafter the property was open to lease by other persons and one G. W. Anderson, on April 29, 1954, obtained a lease covering this property. After obtaining such lease the said G. W. Anderson assigned his lease to Rocky Mountain. The

accident, which is the basis for this suit, occurred June 1, 1954, and on June 11, 1954, Rocky Mountain in writing agreed that the lease obtained from G. W. Anderson was subject to the drilling contract which Rocky Mountain had with Shell. This confirmation is Exhibit C attached to Plaintiff's Exhibit 9 of the record in this case.

At the time of the accident the oil well drilling was being carried on exclusively by Rocky Mountain with materials and labor entirely supplied and controlled by Rocky Mountain. Under the terms of the "farm out" agreement between Shell and Rocky Mountain, Shell was obligated to pay Rocky Mountain a fixed amount of "dry hole" money if the well was not productive and had the right to obtain samples as the drilling progressed. The evidence showed that such agreement was usual and ordinary in this industry and there was no evidence showing any modification of such agreement or control by Shell of such drilling operations. The evidence showed that the only acts of Shell with reference to said drilling operations were covered by the terms of the contract between Rocky Mountain and Shell. There was no evidence showing, no contention made by Plaintiff, and no instruction by the court that the contract between Shell and Rocky Mountain was uncertain or ambiguous. Such contract as above identified is before this court for examination.

The evidence also showed that no employee of Shell was even present at the drilling operations until the morning when the accident occurred. At that time

Mr. Loren McIntyre, a geologist for Shell, had gone to the drilling site to await the start of work for the purpose of obtaining drill samples and making a report on them to his employer, the Shell Oil Company.

For some days after the occurrence the geologist employed by Shell visited the drilling site at different times to obtain drilling samples and make reports. It is submitted that the evidence clearly shows that he had nothing to do with the operation except to pick up samples and make his reports to Shell. The evidence also showed that Shell and Rocky Mountain were proceeding upon the basis of Rocky Mountain being an independent contractor and, as Judge Clark pointed out in his Order vacating the first judgment entered against Shell, which is hereinafter set out in its entirety, neither Rocky Mountain nor Shell ever intended that this was a joint venture or any arrangement other than an independent contract. Accordingly, it is and has always been the position of Shell that Shell is in no way liable for the negligence, if any, of the employee of Rocky Mountain who caused the injury to Plaintiff. Plaintiff at all times knew and relied upon the fact that Rocky Mountain was carrying on the well drilling operations. This is shown in the testimony of the Plaintiff (R. 124).

"Q. And at that time you did know who these men were working for, did you?

A. Well, like I say, I thought they were working for Rocky Mountain Oil Company. I am pretty sure they were.

Q. Was that the company that was carrying on

the drilling operations out there, Mr. Prestidge?

A. So far as I know it is, yes.

Q. And you were aware of that at the time you contacted these men and at the time you went out to the drill site?

A. Yes, sir."

The first trial of this case was held October 3 and 4, 1955, with Judge Chase Clark presiding. The trial court refused to dismiss the action against Shell and submitted the question of liability and the questions concerning the relationship between Shell and Rocky Mountain to the jury. The jury returned a verdict against Shell and Rocky Mountain in the amount of $53,934.53. Following the entry of judgment Shell made Motion for Judgment in Accordance with Motion for Directed Verdict. On March 8, 1956, the trial court, speaking through Judge Clark, granted the Motion and entered its Order. Since the Order so directly discusses the issue involved in this case, we herewith set it out verbatim.

"This matter is before the Court at this time on defendant Shell Oil Company's Motion to set aside the Judgment and enter Verdict in accordance with its motion for directed verdict, duly made; and in lieu thereof a motion for a new trial. Briefs have been filed and the Court has fully considered the same.

The matters alleged as error here, with which the court is primarily concerned, are those numbered (3) and (4) in the motion, dealing with the failure of the Court to instruct as a matter of law with re-

spect to the relationship of the Shell Oil Company and Rocky Mountain Oil Corporation, and the alleged error of the court in instructing the jury with reference to joint enterprise, principal and agent and master and servant; Shell Oil Company contending that the evidence was totally insufficient to show any such relationship between Shell Oil Company and the other defendant.

At the time of the trial of this case, before the jury, the questions presented by this Motion were presented to the Court on Defendant's Motion for Directed Verdict. It was the court's opinion at that time that, rather than prolong the trial by going into an involved study of the points concerned, it should rule without delay, keeping in mind its right to rule on a motion such as this after due consideration and deliberation. This the Court has now done.

Where facts are in dispute as to what the relation is between parties concerned, that determination must be left to the jury; but where that question is to be determined through contracts and agreements, as in the instant case, the relationship of the parties should ordinarily be found by the court.

The Court is of the opinion that the paper filed with the Bureau of Land Management was not effective to make Rocky Mountain Oil Corporation an agent of the Shell Oil Company in all particulars, but was only for the express purposes therein stated.

As to whether a joint adventure existed, we must look to the contracts, the intentions of the parties and all the other attendant circumstances.

'It is impossible to define the relationship of joint adventure with exactitude and precision. In many respects it is analogous to a partnership, the main difference being that a joint adventure is more limited in its scope of operation than a partnership. In the main, some of the relevant facts of a joint adventure are that there must be joint interest in the property; there must be an agreement, express or implied, to share in the profits and losses from the venture; there must be action and conduct showing cooperation in the property. It has been held that it is not absolutely necessary that there be participation in both profits and losses. While it is possible to lay down the general characteristics of a joint adventure, in the end, whether a certain transaction constitutes such a relationship can be determined only from a full consideration of all the relevant facts and circumstances in each particular case.' (Kasishke vs. Baker, 146 F. 2d 113, at 115.)

Here there was no control over the well drilling by Shell Oil; while interested in the outcome, it was not concerned with methods or means employed. Certainly it does not appear that either party intended this as a joint venture. There was no participation in profits and losses. The agreement provides that all costs incurred by the drillers of any nature were to be borne by them. In case of a dry hole they were to be paid a definite sum per foot of depth of the hole. In case the well was a success there was a provision for a royalty fee. After due consideration, the Court

feels that under the contracts, agreements and assignments involved herein and the somewhat lengthy and, in some respects, detailed provisions thereof, the relationship was one of independent contractor.

For these reasons the Court feels, without going into the other matters alleged as error, that it should grant the Motion of Shell Oil Company for Judgment in Accordance with the Motion for a Directed Verdict, and

It is so ORDERED.

Dated this 8th day of March, 1956.

s/ Chase A. Clark
Chief Judge, United States
District Court, District of Idaho.

The judgment will stand as against the Rocky Mountain Oil Corporation."

Thereafter on March 23, 1956, the court vacated the judgment as against Shell. Subsequent thereto the Plaintiff moved for a new trial as against Shell on the basis of allegedly newly discovered evidence. This motion was based upon the affidavit of Mr. Coughlan, attorney for Plaintiff; Edmund W. Windolph, and Clarence S. Robinson who claimed they would give new evidence if a new trial were granted. Based upon such showing, and over the objections of Shell, the trial court granted the motion for new trial. The second trial of the case was held May 24, 1956, before the court and jury with Judge Fred M. Taylor presiding instead of Judge Chase Clark, who presided at the first trial. It is submitted that the

claimed evidence of Mr. Windolph and Mr. Robinson did not materialize at the second trial. Mr. Robinson did not testify and instead of bearing out his affidavit conclusion that Shell was in charge of the drilling operations, the testimony of Mr. Windolph, who was in charge of the drilling for Rocky Mountain, conclusively rebutted such conclusion. His testimony (R. 156) is as follows:

"Q. In other words, you received no instructions, did you, from the geologist; you received requests, is that right?

A. Yes, I imagine that is about right, yes.

Q. It is your understanding is it, that so far as this particular job was concerned, Mr. McIntyre had no authority over you in the drilling of that well?

A. That is right.

Q. When you used the statement you relied upon the geologist, isn't it true you meant by that that you expected he would collect his samples and analyze them?

A. Yes, and inform us.

Q. So far as the drilling of that well was concerned, the mechanical aspect of it, and the actual drilling of that well, that was your responsibility; wasn't it?

A. Yes.

Q. And you were the supervisor and had complete control and authority?

A. Yes."

Despite the order of, and conclusion of Judge Chase Clark vacating the judgment against Shell, the trial court at the second trial repeated the error of Judge Clark in the first trial by refusing to instruct the jury on the legal effect of the contract between Rocky Mountain and Shell and the legal relationship created under such contract and again submitted those questions and the question of liability of Shell to jury determination. The first judgment against Rocky Mountain had become final but the form of verdict submitted to the jury at the second trial listed all three companies as defendants. The jury returned a verdict of $10,000.00 and judgment for this amount was entered against Shell on May 28, 1956. Again Shell moved for Judgment in Accordance with Motion for Directed Verdict. This motion was denied and the instant appeal has been taken by Shell.

SPECIFICATION OF ERRORS

Appellant urges the following errors preserved in its "Statement of Points upon which Appellant intends to Rely on Appeal."

1. The error of the trial court in refusing to grant the motion to dismiss made by appellant prior to the trial and in refusing to grant the motion for directed verdict made by appellant at the close of evidence in the first trial of this cause and refusal to grant the motion for directed verdict made by this appellant at the close of the evidence at the second trial.

2. The error of the trial court in refusing to grant the motion for directed verdict of this appellant.

3. Error of the court in granting the motion of Plaintiff for new trial based on newly discovered evidence after the trial court had granted the motion of this appellant for judgment notwithstanding the verdict after the first trial.

4. The instructions of the trial court with reference to joint enterprise, principal and agent and master and servant given on both trials of this cause.

5. The error of the trial court in failing to give instructions requested by this appellant and especially in failing to instruct the jury as a matter of law with respect to the relationship of the Shell Oil Company and the Rocky Mountain Oil Corporation and the error of the court in submitting such questions to the jury.

6. The error of the court in the admission and exclusion of evidence with respect to the work performed by the geologist for the Shell Oil Company.

7. The error of the trial court in allowing interrogatories and admissions and answers thereto read in evidence.

8. The error of the trial court in the instructions given with respect to the relationship of appellant and the other named defendants to this said action.

9. The error of the court in refusing to grant the motion of this appellant for judgment in accordance with motion for directed verdict or for new trial.

10. The error of the trial court in refusing to dismiss the action as against the appellant, the refusal to grant the motion for directed verdict, and the error of the court in refusing to grant the motion of

appellant for judgment in accordance with motion for directed verdict or for new trial.

POINTS OF ARGUMENT

POINT 1

In this case the plaintiff had the duty of proving Shell responsible for the negligence, if any, of the employee of Rocky Mountain.

AUTHORITIES

Whalen vs. Zinn, 60 Idaho 722, 96 Pac. 2d 434.

Hayward vs. Yost, 72 Idaho 415, 242 Pac. 2d 971.

ARGUMENT

In this case the plaintiff claimed that Shell was responsible for the negligence of Mr. Doman, employee of Rocky Mountain. Admittedly the work at the drilling site was being carried on by Rocky Mountain with materials and labor which it supplied at its expense and over which it exercised complete and absolute control. The evidence showed that Shell exercised no control over the manner or means of doing the drilling work and that Rocky Mountain had even changed the drilling site from that originally specified. There was no evidence showing modification or variance in the relationship of Rocky Mountain and Shell from the terms of the written contract between these companies. Both of the contracting parties proceeded upon the basis of this being an independent contract arrangement and Rocky Mountain being an

independent contractor. Neither party intended otherwise. The contract was an ordinary one in the industry, free from ambiguity.

The statement of the court in Whalen vs. Zinn, supra, that

> "having predicated his action on the negligence of Fite, while acting as agent of respondent, the burden of proof was on appellant to establish the agency," and
>
> "The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done.
>
> The evidence shows Fite was the employee of Hahn, not of respondent; that it is common practice among wholesale and retail dealers in the plumbing and heating trade for the retailer to purchase supplies from the wholesaler, and should the wholesaler be called on to have work done on the goods in order to meet the requirements of the retailer's customer, an extra charge, in addition to the wholesale price, will be made therefor; that an extra charge was made in this case for cutting and threading the pipe. It is clear that in doing this cutting and threading Fite was acting as the employee of Hahn. There is nothing in the record to show respondent had, or sought to exercise, any authority over Fite, or over Hahn's shop, tools or machinery,"

is equally applicable in the instant case. Rather than showing liability on the part of Shell, the evidence clearly disproved liability. The trial court committed error in not dismissing the action against Shell.

POINT 2

In the performance of the oil well drilling operation under contract with Shell, Rocky Mountain was an independent contractor and therefore Shell was not liable for the acts of the employee of Rocky Mountain.

AUTHORITIES

A. J. Thegpin vs. Midland Oil Co. (CCA 8th) 4F. 2d 85, 273 U.S. 658.

Shell Oil Company vs. Richter (Cal.), 125 Pac. 2d 930.

Moreland vs. Mason, 45 Idaho 143, 260 Pac. 1035.

27 Am. Jur. Independent Contractors, Sec. 6 through 25.

27 Am. Jur. Sec. 17 p. 488 through 499.

Joslyn vs. Idaho Times Publishing Co., 56 Idaho 342, 53 Pac. 2d 323.

Re: General Electric Co., 66 Idaho 91, 156 Pac. 2d 190.

Hartburg vs. Interstate Engineering Co., 58 Idaho 437, 75 Pac. 2d 997.

Penson vs. Minidoka Highway District, 61 Idaho 731, 106 Pac. 2d 1020.

Laub vs. Meyer, 70 Idaho 224, 214 Pac. 2d 884.

Horst vs. Southern Idaho Oil Co., 49 Idaho 58, 286 Pac. 369.

Ohm vs. J. R. Simplot Co., 70 Idaho 318, 216 Pac. 2d 952.

Gregg vs. Cook Cedar Co., 64 Idaho 50, 127 Pac. 2d 757.

Moore vs. Phillips (Ark.), 120 S.W. 2d 722.

Arkansas & Louisiana Gas Co. vs. Tuggle (Ark.) 145 S.W. 2d 154.

McFadden vs. Penzoil (Pa.), 9 A. 2d 412.

Seismic Exploration vs. Dobray, (Tex.) 169 S. W. 2d 739.

Taylor vs. Blackwell Lumber Co., 37 Idaho 707, 218 Pac. 356.

E. T. Chapin Co. vs. Scott, 44 Idaho 566, 260 Pac. 172.

Snyder vs. Southern California Addition Co. (Cal.), 276 Pac. 2d 638.

ARGUMENT

The contract terms between Shell and Rocky Mountain determine the relationship of the two companies. Shell was the holder of the lease on this particular land under contract and agreed to turn over the lease on said land in return for which Rocky Mountain agreed to drill the exploratory well. Such "farm out" contracts are usual and ordinary in the industry. The agreement contained terms agreed upon by the two companies dealing at arms length.

Neither company had an interest in the other; they were completely separate organizations and so contracted.

As pointed out in 27 Am. Jur., Independent Contractor, Sections 6-25, the pertinent tests in determining whether the relationship is that of principal and agent or independent contractor are:

(a) Control of the premises.

(b) Control of the terms of work to be performed.

(c) Control of the workmen.

(d) Which party furnishes the workmen, materials, and appliances to do the work.

(e) The measure of compensation and method and time of payment.

(f) By whom the workmen are paid.

(g) Whether the work is performed by a party engaged in such occupation or type of work.

(h) Whether the work requires special skill.

(i) The right to hire workmen to perform such work.

With reference to the nature of the work being done, persons acting in the capacity of certain occupations, such as lessors and lessees, are generally regarded as independent contractors.

27 Am. Jur. Independent Contractors, p. 498-499.

A party placed in possession of property held under an oil and gas lease under a contract providing for assignment of the lease when he completed a well

on the property is a tenant in possession with substantially the same relationship to the premises as though there had been an absolute assignment of the lease. An assignor under such circumstances is not liable for the negligence of the assignee in possession. Upon such assignment and entry to possession by the assignee, the duty and liability of the original lessee assignor to third persons are no greater than that of a landlord.

A. J. Thegpen vs. Midland Oil Co. (CCA 8th) 4 F. 2d 85, Writ of Error dismissed, 273 U.S. 658.

An oil lessor is not liable to third persons for the torts of his lessee.

Shell Oil Co. vs. Richter (Cal.) 125 Pac. 2d 930.

With reference to the control of details of work to be performed, it is pointed out in 27 Am. Jur. p. 488, that:

"In weighing the control exercised, however, authoritative control must be carefully distinguished from mere suggestion as to detail or necessary cooperation as where the work furnished is part of a larger undertaking. As a practical proposition, every contract for work to be done reserves to the employer a certain degree of control, at least to enable him to see that the contract is performed according to specifications."

"The mere retention by the owner of the right to inspect work of an independent contractor as it

progresses for the purpose of determining whether it is completed according to plans and specifications does not operate to create the relationship of master and servant between the owner and those engaged in the work."

The fact that the contractor employs, pays and has full power to control the workmen is virtually decisive of his independence and the fact that he does not have the control of the workmen is entitled to consideration as showing his lack of independence.

27 Am. Jur. 492.

An independent contractor is one who renders service in the course of an occupation representing the will of the employer only as to the results of the work and not as to the means by which it is accomplished.

Moreland vs. Mason, 45 Idaho 143, 260 Pac. 1035.

"The relationship of master and servant exists whenever the employer retains the right to direct the manner in which business shall be done as well as the result to be accomplished. The fact that the work is to be done under the supervision of an architect or that the employer has the right to make alterations, deviations, additions and omissions from the contract, does not change the relationship from that of an independent contractor to that of a mere servant and a reservation by the

employer of the right to supervise the work for the purpose of merely determining whether it is being done in accordance with the contract does not affect the independence of the relationship. The fact that the work is to be done under the direction and to the satisfaction of certain persons representing the employer does not of itself render the person contracted with to do the work as a servant."

Joslin vs. Idaho Times Publishing Company, 56 Idaho 342, 53 Pac. 2d 323.

The test in determining whether a party is an independent contractor is the right to control and direct the activities of its employees and the power to control the details of the work to be performed.

Penson vs. Minidoka Highway District, 61 Idaho 731, 106 Pac. 2d 1020.

Even if the work is to be done to the satisfaction of representatives of the employer, this does not change the relationship from independent contractor.

Laub vs. Meyer, 70 Idaho 224, 214 Pac. 2d 884.
Horst vs. Southern Idaho Oil Company, 49 Idaho 58, 286 Pac. 369.

The most important tests are the right of control as to the method of doing the work contracted for, the power to discharge employees, and method of payment.

Ohm vs. J. R. Simplot Company, 70 Idaho 318, 216 Pac. 2d 952.

In the case of Gregg vs. Cook Cedar Company, 64 Idaho 50, 127 Pac. 2d 757, the parties had an oral agreement for the manufacture of cedar poles. The compensation to be paid was by piece dependent on size. The employer paid bills and advanced the necessary funds to carry on the work which was charged back to the contractor. The evidence showed that the Vice President of the employer directed the specific logs and method of manufacture of a portion of the poles contracted for. Despite such extensive control the court held an independent contractor relationship was established.

In the case of Hayward vs. Yost, 72 Idaho 415, 242 Pac. 2d 971, the Idaho Supreme Court quoted Section 250 of the Restatement of the Law of Agency by the American Law Institute with approval:

> "Except as stated in Section 251 a principal is not liable for physical harm caused by the negligent physical conduct of an agent who is not a servant, during the performance of the principal's business, unless the act was done in the manner directed or authorized by the principal or the result was one intended or authorized by the principal," and
>
> "A principal employing another to achieve a result but not controlling nor having the right to control the details of his physical movements is not responsible for incidental negligence while

such person is conducting the authorized transaction. In their movements and their control of physical forces, they are in the relation of independent contractors to the principal. It is only when to the relationship of principal and agent there is added that right to control physical details as to the manner of performance which is characteristic of master and servant, that the person in whose service the act is done becomes subject to liability for the physical conduct of the actor."

When a defendant oil company entered into contract with another company for the construction of a refining unit at one of its plants on "cost plus" basis, which required defendant company to pay for labor and materials used by contracting company in addition to an engineering fee, the contract did not establish relationship of principal and agent between the two companies, but the contracting company was an independent contractor.

McFadden vs. Penzoil Company (Pa.), 9 A. 2d 412.

A petroleum company contracting with another corporation for reflection seismograph exploration was not liable for damage to land and buildings thereon because of vibration resulting from explosions of small dynamite charges by contractor in making seismograph tests no closer than 100 feet from such buildings as the contract did not contemplate blast-

ing operations of intrinsic dangerous work and the petroleum company did not control the method of doing the work.

Seismic Explorations vs. Dobray (Tex.), 169 S.W. 2d 379.

The right of discharge does not change the independent contractor relationship.

Tayor vs. Blackwell Lumber Company, 37 Idaho 707, 218 Pac. 356.

Nor does the method of payment defeat such relationship.

E. T. Chapin Co. vs. Scott, 44 Idaho 566, 260 Pac. 172.

The person contracting is not liable for the negligence of an independent contractor.

Snyder vs. Southern California Edison Company (Cal.), 276 Pac. 2d 638.

Rocky Mountain was an independent contractor in carrying on the drilling operations at the time the accident occurred, and Shell was not liable for the negligence of Rocky Mountain employees.

POINT 3

Liability for the acts of another under the rule of respondeat superior attaches only when the relation of master and servant or principal and agent is shown to exist between the wrongdoer and persons sought to be charged with liability for the wrong *at*

the time of the injury and in respect to the very transaction out of which the injury arose. (emphasis ours.)

AUTHORITIES

35 Am. Jur. 967-985.

Fuller Company vs. McCloskey, 228 U.S. 194, 57 L. ed. 795.

Standard Oil Company vs. Anderson 212 U.S. 215, 53 L. ed. 480.

Chicago RI & PR Company vs. Stepp (CCA 8th) 164 F. 785.

ARGUMENT

The record in this case shows that no employee of Shell had been around the drilling operations until Mr. McIntyre, a geologist working for Shell, went to the drilling site on the morning of the accident. At that time work had not started. Mr. McIntyre was not even acquainted with the operation at that time. If Shell is liable for the negligence of Mr. Doman, the employee of Rocky Mountain, because of control over the drilling operations such control and relationship had to exist at the time the accident occurred. The trial court failed to recognize this principle of law and allowed extensive testimony concerning the work of Mr. McIntyre, Shell Geologist, subsequent to the date of the accident. This ruling was brought out during the testimony of Mr. McIntyre. (R. 183):

"Q. And how frequent did you visit the drilling site?

Mr. Marcus: May I ask a question in aid of an objection?

The Court: Yes.

Mr. Marcus: Does this relate to periods of time subsequent to the date of this occurrence, Mr. Zener?

Mr. Zener: Yes.

Mr. Marcus: Object on the grounds it is incompetent.

The Court: Objection overruled."

Control of this job by Shell, if any existed subsequent to the date of the occurrence, was immaterial. Obviously it was impossible for Mr. McIntyre to have exercised any control whatever prior to and including the actual occurrence. The rule is correctly stated in Fuller Co. vs. McCloskey, supra,

"In order to recover it must be shown that the relation of master and servant existed between the parties sought to be held liable and the person doing the act complained of in reference to the very act complained of"

"One is liable for the acts of another under the rule of respondeat superior only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged with the result of the wrong at the time of the injury in respect of the very transaction out of which the injury arose."

35 Am. Jur. 985

POINT 4

The written contract between Rocky Mountain and Shell is clear and unambiguous in its terms and therefore the construction of the contract was a a question of law for the court and it was error to submit such question to jury determination.

AUTHORITIES

Whitson vs. Pacific Nash Motor Co. 47 Idaho 204, 215 Pac. 846.

Thornton vs. Budge, 74 Idaho 103, 257 Pac. 2d 238.

Goble vs. Boise Payette Lumber Co. 38 Idaho 525, 224 Pac. 439.

Horst vs. Southern Idaho Oil Co., 49 Idaho 58, 286 Pac. 639.

Harding vs. Home Investment and Savings Co., 49 Idaho 64, 297 Pac. 1101.

California Jewelry Co. vs. McDonald, 54 Idaho 248, 30 Pac. 2d 778.

O'Brien vs. Boston and Maine Railway (Mass.) 91 N. E. 2d 218. 17 C. JS. 129.

First National Bank vs. Cruickshank, 37 Idaho 789, 225 Pac. 142.

Molyneaux vs. Twin Falls Canal Co., 54 Idaho 619, 35 Pac. 2d. 3 C.J.S. 326.

Batt vs. San Diego Sun Publishing Co. (Cal.) 69. Pac. 2d 216.

Texas Co. vs. Brice (CCA 6th) 26 F. 2d 164.

Palugh vs. Van Duyn, 32 Idaho 767, 188 Pac. 945.

ARGUMENT

The above principle of law is too clear and certain to require extensive discussion. As stated by the court in Whitson vs. Pacific Nash Motor Company, 37 Idaho 204, 215 Pac. 945,

> "If a written contract, clear and unambiguous in its terms is relied upon by plaintiff to establish the relationship of principal and agent between defendant and another, the construction of such contract is for the court, and it is error to submit to the jury the question of whether or not such contract creates the relationship of principal and agent."

> "The general rule that the construction of a contract is a question of law for the court if the terms of the contract and the extrinsic facts which may affect its construction are free from dispute and this is true no matter how ambiguous or uncertain are its terms.

Copp vs. Van Hise (CCA 9th) 119 F. 2d 691.

> "The construction of the contract and its legal effect are questions of law for the court."

Pyke Rapids Power Company vs. Minneapolis-St. Paul Railway (CCA 8th) 99 F. 2d 902.

> "Where the terms of a contract are admitted and are not in conflict and are unaided by parol evidence their interpretation presents not a question of fact, but one of law."

Robin Quarries vs. Central Nebraska Public P & I Dist. 64 F. Supp. 200.

"In the instant case the question is inescapable that at the time of the accident in question here, Cottrell was performing duties assumed by him under his written contract with appellant and no other. That being so and the contract being free from ambiguity and clear in its terms, the interpretation put upon it and the relationship created by it between appellant and Cottrell becomes one of law alone for decision by a court unhampered by the implied findings of a jury."

Batt vs. San Diego Publishing Co. (Cal.) 69 Pac. 2d 216.

The case of Arkansas Fuel Oil Company vs. Scaletta (Ark.) 140 S. W. 2d 684 involved an action by plaintiff against the defendant and a service station operator for damages for personal injuries received in an automobile accident. Plaintiff offered in evidence several written contracts between the defendant oil company and the service station operator and also offered oral testimony as to the actual conduct of the parties under the agreements. The lower court submitted the question of whether the service station operator was an employee of the oil company or an independent contractor to the jury and the jury found in favor of the plaintiff. Upon appeal the judgment for plaintiff was reversed, the court holding that the construction of the written contracts was exclusively for the court and that the contracts showed an independent contractor relationship.

In considering whether the question of the rela-

tionship between the oil company and the service station operator was a matter for the court or for the jury, the appellate court said:

> "We cannot agree that the so-called restrictions had nothing to do with the means and method by which the filling station was operated. The governing distinction is that if the control of the work served by the employer is controlled not only as to the result, but also of the means, and the manner of the performance, then the relationship of master and servant necessarily follows, but if control of the means be lacking and if the employer does not undertake to direct the manner in which the employee shall work in the discharge of his duties, then the relationship of independent contractor exists."

There is no claim of ambiguity in the contract between Rocky Mountain and Shell, and the court had the duty to interpret it. After the first trial of this case the trial court recognized this correct principle of law and that it had been in error in not giving effect to it. Strangely the trial court in the second trial completely disregarded this correct principle of law and fell into the same error committed by the trial court in the first instance.

Shell and Rocky Mountain had no other agreement changing or modifying the contract. Neither party acted outside or in a manner contrary to the provisions of the contract and Shell did nothing except as provided and allowed under the contract terms. The

court had the duty to interpret the contract between Shell and Rocky Mountain and instruct the jury as to its legal meaning and effect, including the relationship it created between Shell and Rocky Mountain.

POINT 5

The instructions given by the trial court were erroneous and prejudicial. There was no evidence that Shell and Rocky Mountain were engaged in a joint adventure and submitting this and other questions to the jury was error.

AUTHORITIES

Hogge vs. Joy (Wyo.) 200 Pac. 96, 18 A.L.R. 469.

San Francisco Iron & Metal Co. vs. American M & I Co. (Cal.) 1 Pac. 2d 1008.

Garrison vs. Place (Ohio), 190 N.E. 2d 569.

Painter vs. Lingen, (Va.) 71 S. E 2d 355.

Shell Oil Co. vs. Richter (Cal.) 125 Pac. 2d 930.

Bowmaster vs. Carroll (CCA 8th) 23 F. 2d 825.

Balding vs. Camp (Tex.) 6 S. W. 2d 94.

Gottleib Brothers vs. Culbertson, (Wash.) 277 Pac. 447.

58 C.J.S. Sec. 251, pg. 709.

Spier vs. Lang (Cal.), 53 Pac. 2d 138.

Finn vs. Drtina (Wash.) 194 Pac. 2d 347.

Traretto vs. G. H. Hammond Co., 110 F. 2d 135.

Johnson vs. Murray Company, (Tex.) 90 S. W. 2d 920.

Snodgrass vs. Kelley, (Tex.) 141 S. W. 2d 381.
Grace vs. Tannehill, (CCA 5th) 54 F 2d 1059.
Luling Oil and Gas Co. vs. Humble Oil and Refining Co., 191 S. W. 2d 716.
Simms vs. Humble Oil and Refining Co., (Tex.) 252 S. W. 1083.
Roote vs. Tomberlin (Tex.) 36 S. W. 2d 596.
Siefert vs. Brown, (Tex.) 53 S. W. 2d 117.
Lowery Oil Corporation vs. Bennett, (Texas) 16 S. W. 2d 947.
Gardner vs. Wesner, (Tex.) 55 S. W. 2d 1104.
Donegan Tool and Supply Co. vs. Carroll, (Tex.) 60 SW. 2d 296.
Ruck vs. Burch, (Tex.) 156 S. W. 2d 975.
58 C.J.S. 709.

ARGUMENT

"There must be substantial evidence proving that parties intend to perform a joint venture before the question may be submitted to a jury."

Hogge vs. Joy (Wyo.) 200 Pac. 96;
San Francisco Iron & Metal Co. vs. American M & I Co. (Cal.) 1 Pac. 2d 1008.

"Proof of the essential elements of a joint venture is necessary before the proof may be submitted to a jury."

Garrison vs. Place (Ohio) 109 N. E 2d 569.

"The question of whether parties are engaged in a joint enterprise is for the court if the evidence is not in conflict."

Painter vs. Lingen (Va.), 71 S. E. 2d 355.

"A joint proprietary interest and a right of mutual control over the subject matter of the enterprise or over the property engaged therein is essential to a joint adventure. Particularly is this true with respect to negligence cases in which the element of joint venture is present; in that class of cases unless each has some voice or right to be heard in the control or management of the enterprise a joint enterprise is not deemed to exist."

30 Am. Jur. 682.

Joint participation in the conduct of the business is an essential element of a joint venture.
Spier vs. Lang (Cal.) 53 Pac. 2d 138.

"As previously stated a joint adventure arises out of and must have its origin in a contract, express or implied, in which the parties thereto agree to enter into an undertaking in the performance of which they have a common job and in the objects and purposes of which they have a community interest, and further a contract *in which each of the parties has an equal right to a voice in the manner of its performance, and an equal right of control over the agencies used in the performance.*" (Emphasis ours)
Finn vs. Drtina, (Wash.) 194 Pac. 2d 347.

"A joint adventure is an association of persons to carry out a certain business enterprise for profit, for which purposes they combine their property, money, effects, skill and knowledge and each participant therein is an agent for each of the

others and *it is essential that each have control of the means employed to carry out the common purpose.*" (Emphasis ours)

Traretto vs. G. H. Hammond Co., 110 F. 2d 135.

The authorities uniformly hold that where the rental and consideration for a lease is based even upon compensation out of net profits or on percentage of shares of leased business, no joint enterprise or partnership is created but that only the element of landlord and tenant is created.

Johnson vs. Murray Company, (Tex.) 90 S. W 2d 920.

In Snodgrass vs. Kelley (Tex.), 141 S.W. 2d 381, the lessee assigned a portion of his undivided 7/8ths interest in a lease and then drilled a well, during which operation an employee was injured. The employee included the assignees in his action. The court stated:

"Appellant further contends that the appellees and Mitchell were joint owners of the leasehold estate and had agreed to jointly drill the well and were to share the profits from the production of oil, if any, and that the parties were mutual agents for each other. The question of mutual agency has little or no bearing on the issue of whether or not the partnership has been created. We are inclined to believe it is an incident that follows in the event the partnership was created rather than a fact

to consider in determining the existence of such partnership. We are also of the opinion that the evidence in this case fails to show a joint ownership of the leasehold estate. The assignments clearly show that each party owned an undivided interest in the estate, but there is no evidence to show that they were joint owners of any portion of such leasehold estate. This distinction is clear and material. We are also of the opinion that the evidence fails to show a mutual undertaking of the drilling operations. The evidence is undisputed that Mitchell had absolute control of all drilling operations. There is no evidence to show that the appellees contributed any labor, money or services toward the drilling of the well. As above stated, the only thing that they did was to purchase an undivided interest in the leasehold estate. We are also of the opinion that the evidence fails to show that any mutual sharing of profits was contemplated in Mitchell's drilling the well in question. Under the law as it now exists in this state each of the appellees was entitled to his undivided interest in the minerals and would also be entitled to the same if production was had. As cotenants they would be entitled to receive their portion of the production, but it does not necessarily follow that they were to share in any profits made by Mitchell out of his undivided interest, if any profits were made by him. The profits, if any, made by him out of his leasehold estate would be his profit, and not one that he would have to share with someone else."

In many of the authorities a joint venture is looked upon as a partnership for that particular project and in the case of Grace vs. Tannehill (CCA 5th) 54 F 2d 1059, the court pointed out that to establish such a partnership a definite understanding whether tacit or express must be shown with reasonable certainty by a clear preponderance of the evidence.

In Luling Oil and Gas Company vs. Humble Oil and Refining Company, 191 S. W2d 716, it was held that the relationship of partners, joint adventurers or mining partners being contractural in nature, whether such relationship exists depends upon the intention of the parties.

In Simms vs. Humble Oil and Refining Co., (Tex.) 252 SW. 1083, a contract had been entered into between assignee who had acquired part of an oil lease from lessee and defendant whereby defendant was to loan assignee certain casings to be placed in a development well of the assignee in consideration of 1/16th of any production realized from the well, such casing to be returned if the well was dry and the contract further provided that defendant was to have a lien on the casing in the well to secure the performance of the contract. The court held that this did not create a mining partnership.

To the same effect are Roote vs. Tomberlin, (Texas) 36 S. W. 2d 596; Seifert vs. Brown, (Tex.) 53 S. W2d 117; Lowery Oil Corporation vs. Bennett, (Tex.) 16 S. W2d 947; Gardner vs. Wesner, (Tex.) 55 S. W. 2d 1104; Donegan Tool & Supply Co. vs. Carroll (Tex.) 60 S. W. 2d 296.

In Ruck vs. Burch (Tex.) 156 S. W. 2d 975, the lessee assigned an undivided fractional interest in a lease and the plaintiff thereafter sued both the lessees and their assignees for rental value of a drilling rig. In holding that the assignees were not liable the court stated:

> "In this case under the above record we are confronted with this simple question. Did said parties constitute themselves partners with Jeans and Sheffield by merely taking an assignment to an undivided fractional interest in the above lease and of the personal property used in connection therewith. Under the circumstances above detailed I think that to ask this question is but to answer it in the negative. *It is settled as a law of this state that in order to constitute a mining partnership arising by operation of law there must not be only joint interest in the mining property, but joint operation thereof as well. Joint ownership without joint operation merely constitutes co-tenancy.*" (Emphasis ours.)

The above authorities indicate the principles to be applied in determining whether parties are engaged in a joint adventure and whether the question should be submitted to the jury. In the instant case, Judge Clark, at the first trial, submitted this question to the jury recognizing that the contract terms were clear, that the parties had proceeded entirely within the contract terms and that there was no modification or variance of that contract. After careful study

it was his considered opinion that this was error and as a result he made his order vacating the first judgment against Shell. Despite his considered opinion and order, the court at the second trial disregarded his conclusion and fell into the same error that he had committed in the first trial by again submitting this and other law questions to the jury.

The instructions given by the court were incomplete and misleading. There was no evidence which warranted the instructions on joint venture. As pointed out in the objections to the instruction, it did not instruct on the necessity of joint participation and common control by the parties. The instructions on independent contractors emphasized those elements which would disprove such relationship and omitted elements which would prove the independent relationship such as control of workmen, party paying the workmen, method and time of payment, the furnishing of materials and capital, and the differences between a controlled result and the control over the particular method and means of achieving that result. These errors of commission in the giving of the instructions were in addition to the error of the court in failing to construe and interpret the contract and determine the relationship between Rocky Mountain and Shell as a matter of law.

The evidence showed conclusively that Shell and Rocky Mountain were independent contracting parties. There was no sharing of either profits or losses; neither company had anything to do with the operations of the other; Rocky Mountain put its own

money in the drilling operations, furnished its own labor, hired such labor at wages which it fixed, determined when and how they were to be paid, without any right of Shell to govern or control them in any respect. Rocky Mountain furnished the equipment and materials for the drilling, the company was engaged in work in this field, determined the hours of work and when the drilling would commence and stop. Rocky Mountain even changed the location of the drilling site on the leased Lot 2. The contracting parties do not claim that a joint venture existed. The plaintiff in no way was misled. As shown in his testimony, Plaintiff knew that Shell was not drilling the well and knew that Rocky Mountain was drilling the well. He had sought employment from Rocky Mountain and as shown in the testimony of Dr. Rulon B. Lindsay (R. 170-171), the Plaintiff had informed the doctor that he was actually working for Rocky Mountain.

"Q. Did he later tell you what company he was working for, or had reported to work for?

A. Well, I think he called it the Rocky Mountain Drilling Company.

Q. Was it the Rocky Mountain Oil Corporation?

A. As near as I know, I can look at my records, because I had to get that history from him, and that is the Rocky Mountain Drilling Company."

Only for the purpose of this suit has the Plaintiff claimed that Shell was in any way responsible for

what happened to him on the morning of the accident.

The determination of the trial court to hold Shell in the case can only be explained by the fact that perhaps this type of "farm out" drilling agreement, though common in oil and gas producing areas, was somewhat strange to this court. If a party to such contract is to be held liable for the acts of the other then it is submitted that a like ruling could be made with respect to almost any type of contract. Every contract involves a controlled result to be achieved by the contracting parties. For example, a contract in which the buyer agrees to place certain improvements on the property or to maintain insurance on improvements could involve the same reasoning erroneously applied in this case. Rocky Mountain and Shell were independent contracting parties and the contract was being carried out by them in strict conformity to the contract terms. Shell, although interested in the results of the oil well drilling, had no control whatever over the performance of the work, details of the work, or of the means employed in carrying out the work. Shell was entitled to have the court construe the contract and a correct interpretation of the contract required the dismissal of this action against Shell.

POINT 6

The court committed error in the rejection and admission of evidence submitted in the trial of this case.

ARGUMENT

The court allowed the admission of answers to interrogatories given prior to the trial without requiring any foundation for the admission of this type of evidence. The rulings of the court are shown in the record beginning at page 200 and especially at pages 211-219. Objection was interposed to each and all of the answers to interrogatories as not being admissable primary evidence. The court allowed answers to all the questions to be admitted in evidence, which answers merely set forth the contract provisions of the agreement between Shell and Rocky Mountain. The obvious purpose of such evidence was to detail the different provisions of the contract to emphasize in the minds of the jury that Shell was the principal in the well drilling operations merely because of the number of provisions the contract contained. The court erroneously proceeded upon the basis that any such answers were admissable without a showing of relevancy or competency.

Attention is also called to the ruling of the court preventing the Defendant from submitting in evidence the written notes of Dr. Rulon B. Lindsay on his cross examination after he had waived the physician-patient privilege by testifying in behalf of the Plaintiff. The ruling of the court is shown in the record at page 173:

> "Mr. Marcus: We point out that on direct the Doctor had been referring to these instruments, and therefore I think we would be entitled to have

them put into evidence. They are the best evidence, of course.

The Court: You can cross-examine him on anything he referred to but they are his notes.

Objection sustained."

This ruling prevented a series of later questions pertaining to the doctor's written material and the ruling was obvious error.

CONCLUSION

The judgment of the trial court should be reversed and the action ordered dismissed as against Appellant.

Respectfully submitted.

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IN THE

United States
Court of Appeals
For the Ninth Circuit

SHELL OIL COMPANY, a Corporation,

Appellant,

vs.

LANUS WAYNE PRESTIDGE,

Appellee.

REPLY BRIEF OF APPELLANT

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FILED
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TABLE OF AUTHORITIES

STATEMENT

In replying to the brief of Appellee, Appellant first wishes to correct a statement made in the opening brief of Appellant. On page six therein it was stated that in the first trial of the instant case the jury returned a verdict against Shell and Rocky Mountain of $53,934.53. The verdict in the instant case at the first trial was $19,905.85. The $53,934.53 verdict was returned in the companion case of Wuthrick vs. Shell Oil and Rocky Mountain. At the second trial of the Wuthrick case, the jury returned a verdict for the defendants.

Appellant also wishes to correct a statement made in the brief of Appellee filed herein. At page 33 it is claimed that work had started at the drilling site, on the morning of the accident, prior to the time the accident occurred. This is not correct. Drilling operations had not started at that time as shown in the testimony of Loren McIntyre appearing at page 199 of the Record:

> "Q. Was there any actual drilling at or on the morning of the first from the time you got out there up to and including the time this accident occurred?
>
> A. There was not."

This testimony was not denied and was supported by the testimony of Edmund W. Windolph, a witness for the Appellee, appearing at page 156 of the Record.

> "Q. You mentioned the fact that they had been broken down several times; it is true, isn't it, you were broken down at the time you related that the

accident happened and prior to when Mr. McIntyre arrived in town?

"A. Yes, I think it was a parted universal joint."

It will be recalled that the Record shows Loren McIntyre, the Shell geologist, was at the drilling site for the first time on the morning this accident occurred. Drilling had not yet started. The testimony further showed that no other Shell geologist or any other personnel of Shell had been at the job site prior to that time, so obviously the argument of Appellee that the Shell geologist had some control over the operations at the time the accident occurred is totally unrealistic.

The brief of Appellee does not clearly reveal the grounds upon which he claims the judgment in this case should be sustained. No analysis of the case is made but the argument of Appellee is based upon a statement of abstract principles of law. It is important to determine if those abstract principles of law apply to the facts of this case. The general statements made demonstrate the shifting positions taken by the Appellee.

ARGUMENT

APPELLEE POINTS I AND II

Appellee argues that Rocky Mountain and Shell were engaged in a joint adventure. The argument under this point first begs the question by assuming a joint adventure and then stating the rule of law making one joint adventurer liable for the negligence of another.

Under point II, Appellee, without considering or discussing the written contract between Rocky Mountain and Shell, claims several things were done which show a joint adventure. The first is the statement that Shell obtained the land to be drilled. It is difficult to see how this made Shell a joint adventurer with Rocky Mountain since Shell acquired the lease from Barhaug, the original Lessee, long before Rocky Mountain came into the picture. It will be recalled that Shell made the drilling contract originally with Wheeler and Gray, a partnership, and Rocky Mountain became a party to the contract by assignment from Wheeler and Gray. Appellee then points to the fact that certain leased ground was assigned to Rocky Mountain under the terms of the drilling contract, and that title and geological information was furnished Rocky Mountain. It would be strange indeed if the lessee did not convey such information to a driller. This was provided under the terms of the contract and if the contract made the parties joint adventurers the Court had the duty to so advise the jury.

The final argument of the Appellee to show that a joint adventure existed is that Shell "furnished the geologist for the drilling of the well." This is a misleading statement, the connotation of which is repudiated by the evidence of Appellee himself. The claim that the Shell geologist was in charge of the drilling was obviously an attempt to create a jury question. The proof disproved the argument. The geologist was at the job site for a period of only

about 30 days, some considerable time after the drilling had been started, and then only for the purpose of picking up core samples as the contract provided. If the contracting parties had operated at variance with the contract terms and if other acts of the contracting parties deviated from the contract terms, then a jury question might have been presented, but this was not done. In an endeavor to develop a fact question, the Appellee claimed that the Shell geologist was in charge of the drilling operation. Upon his representation to the trial court that newly discovered evidence would show control of the drilling operations by Shell, the Appellee obtained a new trial. Appellee represented to the trial court that two witnesses, Edmund Windolph, the drilling superintendent for Rocky Mountain, and Clarence Robinson, a foreman for Rocky Mountain, would prove that Loren McIntyre, the Shell geologist who came to the site to pick up samples as provided under the contract, had control of the drilling operations. Upon this representation the trial court granted a new trial. At the second trial Clarence Robinson was not even produced to testify and the Court is invited to examine the testimony of Edmund Windolph on this phase of the case. In response to leading questions such as:

> "Q. Did you rely upon Mr. McIntyre in the drilling of this well so far as the geology phase was concerned?,"

the witness obviously tried to support the Appellee. However, the testimony of any witness is only as

strong as his testimony on cross-examination. The direct testimony of Windolph, tempered by his cross-examination, resolved into his admitting that Mr. McIntyre, the Shell geologist, had no authority over the drilling (R. 156); that even the request of the geologist to take a core sample was refused by the foreman on the job (R. 152); that Rocky Mountain had drilled 960 feet before the Shell geologist came to the drilling site to collect samples (R. 157); and that Mr. McIntyre, the Shell geologist, had not even been on the job prior to the morning when the accident occurred. Thus, the testimony of witnesses for the Appellee conclusively demonstrated that nothing was done outside the terms of the drilling contract, and the court was obligated to determine the relationship as a matter of law and to so instruct the jury. It is significant that the brief of Appellee does not question this principle of law. It completely avoids it. There was absolutely no testimony of acts or conduct of the parties to the drilling contract contrary to, or at variance with the contract terms. This was completely considered and analyzed by Judge Clark when he concluded that the judgment in the first trial should be set aside.

The Appellee claims that additional witnesses were produced at the second trial. Apparently, this is an argument inferring that proof at the second trial showing variance with the contract was stronger than at the first trial. It is submitted that there was absolutely no additional proof in this respect which would have created a jury question.

Appellee argues that Shell and Rocky Mountain were engaged in a joint adventure. He carefully avoids stating whether it is claimed that a joint adventure is shown under the drilling contract or whether a joint adventure is shown by evidence of additional acts of the parties outside of, or at variance with the contract terms. An examination of the authorities listed under this argument reveals that the position of Appellee is not supported since all of the authorities deal with situations involving control outside and beyond contract terms. The following is a short abstract of the authorities cited by Appellee under this point. They will be discussed in the order in which they appear in the brief of Appellee.

30 Am. Jur. 680. This citation merely defines joint adventure.

Stearns vs. Williams, 72 Idaho 276, 240 Pac. 2d 833. The factual situation in that case is in no way similar or analagous to the instant case. There, a husband and wife joined in the purchase of property for the purpose of building and conducting a business thereon. The real question in the case was whether the contract was void as against public policy because the husband was engaged in Government work at the time the contract was made. The case was not decided on the question of joint adventure. However, the Court did state in the Stearns case that the intention of the parties to a contract control as to whether a joint adventure exists. In the instant case the parties to the contract considered it an independent contract and proceeded upon that basis.

Dunclick, Inc. vs. Utah-Idaho Pipe Company, 77 Idaho 499, 205 Pac. 2d 700. There is no similarity between this case and the instant case. In the Dunclick case plaintiff sold materials to defendants and claimed that they were engaged in a joint adventure. One defendant defaulted; the other defendant denied the relationship; there was no written contract between the defendants, but the question of relationship depended on evidence showing their method of doing business, the dealings of the parties and the particular transactions involved in the case. Finding of joint adventure was affirmed. A jury question was involved by reason of the factual questions which had to be resolved.

Shoemaker vs. Davis, (Kan.) 73 Pac. 2d 1043. This action was between the parties to a contract, one contending that a partnership relationship existed. The Court specifically found that the parties agreed to a joint adventure "Fully considered we think the agreement between the plaintiff and defendant implied such a sharing of profits and losses and was essentially a joint adventure." The contract in that case contemplated the joint operation and control of the project and sharing of profits.

Yeager vs. Graham (Kan.) 94 Pac. 2d 317. A quotation from this case at pages 320 and 321 will demonstrate the dissimilarity in the facts of that case and the instant case: "Without intending to make a complete statement thereof, the evidence here showed clearly that the appellant furnished the drilling rig and equipment necessary to be used in

developing the Davis lease under conditions heretofore mentioned; that its president sent one of its employees to attend to certain duties on the lease; that he arranged for other employees; that the appellant honored any draft on it for expenses of various kinds; that it advanced the amount of a bottom wheel order, even though the conditions thereof had not been met."

Gilbert vs. Fontaine, et al, 22 Fed. 2d 657. This case concerned a mining partnership. The court stated: "Mining partnerships are indulged between co-owners only when they actually engage in working the property. Before actual operations begin and after actual operations cease, they are simply co-tenants unless a partnership has been formed." The facts in that case are in no way similar to the instant case.

Eagle Star Insurance Company vs. Bean, 134 Fed. 2d 755. In that case an individual and a junk company engaged in dismantling a sawmill. The contract provided for reimbursement of the purchase price paid by one, then the parties were to divide the profits therefrom. The Court in that case held that the elements of a joint enterprise are:

1. Contract.
2. A common purpose.
3. Community of interest.
4. Equal right to a voice, accompanied by an equal right of control,

the Court saying "Equal right to control means each has equal right of management and conduct of the

undertaking and that each may equally govern upon the subject of *how, when and where the agreement shall be performed.*" *The Court further stated "As a corollary to the preceding requirement, it follows that each party must have an equal right of control over the agencies used.*" (Emphasis ours)

The factual situation and conclusions in this case in no way support the position of Appellee herein.

Schmidt vs. Nash, 217 Pac. 2d 830. This case did not even involve the question of whether a joint adventure existed, but involved an action for a debt on a written contract. In that case each party had an interest in the land and shared expenses. In the instant case Shell had assigned the lease on the land where the well was being drilled by Rocky Mountain and had no interest in the land at the time of drilling except its right to a royalty on the production if a well were brought in.

Sand Springs Home vs. Dail, (Okla.) 103 Pac. 2d 524, is not in point because the joint adventurers each owned an interest in the leasehold and shared in the expenses of operation. Other facts were totally dissimilar to the instant case.

Young vs. Reed, (Fla.) 192 So. 780. The statement made by the Court at page 784 describes a wholly different factual situation:

"Whatever else may be said on the subject it is obvious that the drilling of the two wells were simply efforts to develop the land for oil and gas in keeping with the obligation assumed by Kyle and Bail and passed on by them to the defendants conjointly with DeSoto. Thomas made a contribution to these ven-

tures by allowing the drilling rig and equipment moved into Bossier Parish. He and Dr. Reed made joint contributions toward the ventures by paying the expenses of the rigs removal and erection of the derricks. DeSoto's contribution consisted in the use of the unpaid for rig and his actively supervising the drilling as it progressed."

Grannell vs. Wakefield, (Kan.) 242 Pac. 2d 1075, was totally dissimilar in that there was no question about the partnership existing since both parties participated in the control and management of the enterprise.

Kirkpatrick vs. Baker, (Okla.) 276 Pac. 193, was brought by one of four lessees against the others. All parties admitted that a joint venture existed. The question was whether one had abandoned his interest, or could assert an interest after failing to pay his share of rentals.

Kasishke vs. Keppler, 158 Fed. 2d 113. In this case both parties actually participated in the work and had a joint ownership in the land. A similar situation existed in *Kasishke vs. Baker, 146 Fed. 2d 53*, where both parties contributed services and had a joint interest in the property involved.

Eagle Picture Lead Co. vs. Fullerton, 28 Fed. 2d 472. The question of whether a joint venture existed was not involved. The question involved was whether the parties to a joint venture by engaging in competition for new mineral leases from Indian owners abandoned a joint adventure contract relating thereto.

Bank of America vs. Fisher, 61 Fed. 2d 1060. In that case a receiver for a bankrupt corporation brought an action for interpretation of a contract between the company and defendant, under which defendant advanced the company $25,000.00 to drill oil wells, this amount to be repaid upon the first net production, and then the parties to share the profits therefrom. The contract itself provided that the parties were joint adventurers so there was no serious question about the relationship. The Court did point out a principle supporting the position of the Appellant herein by saying "If the transaction was evidenced by an instrument in writing the intention of the parties is to be determined primarily by a reference to the provisions thereof." In the instant case the contract determined the relationship of the parties, and both construed it to constitute an independent contract and at all times proceeded on that basis.

Ray vs. Cameron, (Mont.) 114 Pac. 2d 1060. In this case there is no question about the defendants being engaged in a joint venture. Both participated in the placer mining project. One contributed the money to purchase machinery under agreement that this money was to be first returned and then the parties to share the profits. However, the Court in that case pointed out to constitute a joint adventure there must be joint proprietorship and control and a sharing of profits and losses.

Wyoming-Indiana Oil and Gas Co. vs. Weston, 7 Pac. 2d 206. In this case the factual situation was entirely different. Parties had agreed to obtain and

develop certain leases, all profits to be shared. There was no serious question about the relationship created.

It is significant, we think, that none of the authorities cited by the Appellee holding a joint adventure involved facts in any substantial particular similar to the instant case. All of the cited cases showed joint control of the manner and means of carrying out the venture and a sharing of profits and losses. The contract involved in the instant case is one of independent contract and should have been so held by the trial court.

APPELLEE POINT III

The Appellee next contends that the question of whether a joint adventure existed between the Shell and Rocky Mountain Companies was a question of fact to be determined by the Jury. An examination of the authorities cited again demonstrates the fallacy and weakness of a statement of general law which does not apply to the factual situation involved in this case.

The following is a brief abstract of the authorities cited by the Appellee to support this argument in the order in which they appear.

48 C.J.S. 875. Appellee apparently refers to the statement in that paragraph to the effect "but whether a joint adventure existed has been held a question of fact." An examination of the authorities forming the basis for this statement demonstrates that this principle is applicable where the question of relationship is not confined to a written contract but involves evidence of proceedings and transactions of

the parties, completely outside of, in addition to or at variance with the provisions of the contract. This factor has apparently been ignored by the Appellee.

48 C.J.S. p. 876, this point is clearly stated: "Where the evidence as to the arrangement between joint adventurers is clear and undisputed, the legal effect of such arrangement is for the Court to determine."

Murry vs. Williams, 114 Fed. 2d 282. In this case there was no question about a joint adventure existing. The only questions involved were questions of fact concerning the transaction out of which the action for damages arose.

Stearns vs. Williams, 72 Idaho 276, 240 Pac. 2d 833 has heretofore been discussed. This was an action for specific performance and determined by the Court without a jury. Specific performance of a contract was denied as against public policy and is not authority for the position of the Appellee.

Russell vs. Boise Cold Storage, 43 Idaho 758, 254 Pac. 797. The question involved in this case was whether services of the plaintiff were rendered for one joint adventurer separately, or whether such services were rendered for both of the joint adventurers. The evidence was conflicting, and therefore it was a question of fact. The case is not helpful in considering the instant case.

Spier vs. Lang, (Cal.) 53 Pac. 2d 138. This case involved a question of partnership and is authority for the position of the Appellant and not of the Appellee. The court stated: "The foregoing conclusion and cited cases are in conformity with the definition of the partnership relationship contained

in the Civil Code, which includes as an essential element *the joint participation in the conduct of the business. The presence of the same element is necessary to constitute the parties joint adventurers.*" (Emphasis ours)

Kaufman vs. Superior Court, (Cal.) 210 Pac. 2d 88, involved a suit for prohibition to restrain the court from adjudging plaintiffs in contempt for refusing to comply with an order permitting inspection and copying of instruments. The Court merely held that the facts alleged in the complaint were sufficient to warrant the court issuing such order.

Hobart Lee Tie Co. vs. Grodsky, (Mo.) 46 S.W. 2d 859. In this case there was no written contract between the parties. The relationship depended on evidence submitted as to method of operations, financing of the business, sharing of profits and in whose names contracts had been made. Under these circumstances the Court pointed out that: "Other facts and circumstances tended to show no joint adventure." In this situation the question was for the jury.

Croft Bank vs. Gradsky, (Kan.) 232 Pac. 1076. This case also involved extensive evidence as to transactions between two parties. Demurrer to the evidence was reversed, the Court holding: "If an agreement that a Lessor is to receive a portion of the net profits as rent goes further and gives to the Lessor control of the business conducted in the leased premises, it is usually construed to constitute a joint adventure." This case is totally dissimilar from the instant one.

Glassman vs. Baron, 178 N.E. 628. The evidence

in this case was conflicting as to relationship existing between brothers-in-law and was therefore a fact question.

R. E. Davis Electric Co. Inc. vs. Hopkins, (Ore.) 64 Pac. 2d 1317. The Court in this case pointed out the rule that is urged by the Appellant: "There was also testimony tending to support the allegations of the complaint in respect to the joint adventure such as showing that Abbot on occasion bought supplies and assumed responsibility for payment of loggers' wages and exercised some control over the operation of the venture." Under such circumstances in view of such evidence of acts and control beyond the terms of the contract the Court held a jury question was presented.

Bennett vs. Sinclair Refining Co., (Ohio) 57 N.E. 2d 776, involved a tort action against joint defendants arising out of an automobile accident. The Court in this case held that where the ultimate facts are undisputed the question of relationship of the defendant is a question of law, and substantially supports the position of the Appellant in this case.

McDonald vs. Follett, (Tex.) 175 S.W. 2d 671, involved conflicting evidence, one party claiming that a partnership relationship existed and the other party claiming that the relationship had terminated with reference to leases which had expired prior thereto. The question involved in the case was not the relationship between the parties but the question of whether the relationship had terminated.

Cockburn vs. Irvin, (Tex.) 88 S.W. 2d 747, was totally dissimilar to the instant case. Defendant de-

nied the agreement with plaintiff. The conflict in evidence raised questions of fact.

San Francisco Iron and Metal Co. vs. American Milling and Industrial Co., (Cal.) 1 Pac. 2d 1008. This case in essence holds that matters leading up to and following a contract could be shown as well as: "Oral understandings had between the parties as to the plan of executing the joint adventure," being an entirely different case than presented herein.

This point III of the argument of Appellee avoids the real question involved in this case. It is based upon the presumption that in addition to the contract, the parties have acted contrary to or in variance with the contract provisions and that Shell exerted control outside the contract. There was no such evidence. This reasoning and logic is entirely unrealistic with respect to the instant case.

APPELLEE POINT IV

Under Point IV the Appellee argues that a joint adventure relationship may be established in favor of third persons by operation of law through the acts and conduct of the parties though they never intended such relationship.

This argument continues to disregard the real facts involved in this case. An examination of the authorities cited under this argument shows completely dissimilar situations. In each case where the above principle is supported, that case shows that representations were made to third parties upon which they relied. The instant case does not involve that situation. As pointed out in our opening brief, the Appellee did not rely upon the Shell Oil Company

as being a party involved in the drilling operations. The Appellee talked to the manager for Rocky Mountain concerning employment. He was attempting to obtain employment with Rocky Mountain, not with Shell. Appellee knew that the labor was being employed and paid by Rocky Mountain as shown by his testimony quoted in the opening brief of the Appellant. The Appellee knew that he was dealing exclusively with Rocky Mountain Company. He knew that Rocky Mountain—not Shell—was drilling the well. He even reported to his doctors that he was working for Rocky Mountain at the time the accident occurred. (R. 171) There was no representation by Shell and no business contact by or with Shell upon which the plaintiff relied or was misled. Thus the authorities cited by Appellee are not in point and have no bearing in this case. The authorities cited, however, support the arguments of Appellant.

Snavely vs. Walls (Cal.) 57 Pac. 2d 161. The Court there stated: "What had these third parties the right to believe from the language of the contract and the conduct of the parties, not as it affected the original makers, but as it affected the third parties."

Aiken Mills vs. U. S., 144 Fed. 2d 23. The question involved in this case was the recovery of processing taxes paid, and is no authority for the position of Appellee. The same observation can be made with respect to *Stearns vs. Williams*, *supra*, and *Dunclick, Inc., vs. Utah-Idaho Concrete Pipe Company.* In the Stearns case third parties were not involved. In the Dunclick case there were direct representations and negotiations between plaintiff and defendants and the question of estoppel was present.

In *Bennett vs. Sinclair, 57 N.E. 2d 783,* (citation should be *57 N.E. 2d 776)* the evidence proved conclusively that defendants were engaged in a joint adventure. The question of a joint adventure existing despite the contrary intention of the parties was not involved.

45 C.J.S. 813, supports the position of Appellant:

"A person by holding himself or by permitting another to hold such person out as a member of a joint adventure may estop himself to deny liability as a joint adventurer to a third person who has acted or changed his position in reliance on such conduct; but there is no liability on the theory of estoppel to one who has not relied or changed his position in reliance on any representation or act which was made or authorized by the person whom it is sought to charge."

This clearly states the basis for liability to third persons. Taking the evidence of the Appellee himself, there is no basis for imposing liability on Shell in the instant case since no representations were made, and nothing done by Shell to mislead or prejudice the Appellee.

APPELLEE POINT V

The Appellee likewise argues that Shell made Rocky Mountain its agent and operator. The instrument which Appellant is apparently referring to was a "Designation of Operator" which a Lessee, who is not doing the actual drilling itself, is required to file with the United States Land Office showing who is doing the actual drilling.

As Judge Clark clearly held, this did not make Rocky Mountain general agent for Shell. It was merely a compliance with the regulations of the Land Office. The filing of this instrument did not mislead Appellee. Appellee did not rely on it and had no knowledge of it. Under such circumstances it has no significance in this case, and the Court was in error in allowing its introduction into evidence.

APPELLEE POINTS VI AND VII

Points VI and VII argue that the question of agency and individual contractor relationship were questions for the jury in this case. Here again the Appellee does not make his position clear as to whether this contention is based entirely upon the written contract between Shell and Rocky Mountain or whether Appellee is claiming that there was evidence showing a variance from the contract or additional evidence of control beyond the terms of the contract. It is the position of Appellant plainly stated in its opening brief that the relationship of Shell and Rocky Mountain must be determined under the written drilling contract. The interrogatories which were submitted and every bit of evidence which the Appellee adduced in the trial merely showed that certain provisions of the written contract were carried out. There was no proof of variance from the contract terms. There was no dispute in the evidence; the facts were clear in showing that Shell had and exercised no control of the method or means of doing the drilling project. As Judge Clark so plainly stated, Shell, although interested in the results of the drilling, had nothing to do with the method, manner or means of doing the drilling.

There was no evidence of agency or joint adventure in this case and the Court should have ruled as a matter of law and dismissed the action as against Shell. The authorities cited by Appellee are not contrary to this holding.

CONCLUSION

This case presents a situation where Appellee has a final judgment against Rocky Mountain Oil Company for $19,905.85, yet, also seeks to collect the additional verdict returned in the second trial of this case. The effect of an independent contract is destroyed if the theory of the trial court is approved. Every such "farm-out" contract leading to oil and mineral development is, in effect, set aside. The Appellee has cited no case holding a similar drilling contract to be other than an independent contract. The parties meant it to be, and construed it to be such. Approving the method and theory employed by the trial court in this case approves an invasion of the power and duty of the court by the fact finding body. It is respectfully submitted that Judge Taylor should have followed the order of Judge Clark and when the Appellee completely failed to support the representations he made to obtain a new trial the Court should have dismissed this action against Appellant.

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Boise, Idaho

GRANT C. AADNESEN
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Counsel for Appellant.

No. 15365

IN THE

United States
Court of Appeals
For the Ninth Circuit

SHELL OIL COMPANY, a Corporation,

Appellant,

vs.

LANUS WAYNE PRESTIDGE,

Appellee.

PETITION FOR REHEARING

FILED

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LANUS WAYNE PRESTIDGE,

Appellee.

PETITION FOR REHEARING

Shell Oil Company, appellant above named, respectfully petitions this Honorable Court for a rehearing of the appeal in the above entitled cause. In support of this petition for rehearing appellant represents to the Court as follows:

I

Appellant reserves its argument and position with respect to each of the submitted errors on appeal, but addresses itself to those points of the decision wherein, it is submitted, the Court should be persuaded that its decision is based upon incorrect principles of

law and upon the incorrect application of principles of law.

II

The decision of this Court, in holding that the contract between Shell Oil Company and Rocky Mountain Oil Company, two totally unrelated corporations, constituted a joint adventure as a matter of law totally demolishes the independent character of a contract that has become ordinary in the oil and gas industry. To sustain its conclusion the Court relies, principally, upon the cases of Stearns v. Williams, 72 Idaho 276, 240 Pac. 2d 833; and Rae v. Cameron (Mont). 114 Pac. 2d 1060. The Court clothes the instant decision with general statements made in the above cited cases although the facts in those cases are totally dissimilar from the facts in the instant case. In Stearns v. Williams, a husband and wife had bought property upon which they intended to conduct a business to be owned and operated by them. The question of joint venture was not a litigated question in the case. Admittedly, they were engaged in a joint venture with all the necessary elements including joint control. In Rae v. Cameron, one contracting party advanced money to conduct certain tests. The agreement provided that if the test was successful, both parties would organize a corporation, each holding half the stock, and would thereafter carry on the enterprise through the corporation. Such facts are very much at variance with the facts in this case.

All controlling decisions on the question of joint venture hold that joint control of the project must exist before a joint venture can be found. The Court in the instant case cites certain provisions of the contract as showing joint control. These include the provisions requiring the well to be drilled to a certain depth, to a depth sufficient to test a certain formation, and providing that the drilling would be stopped if both parties determined that further drilling was not warranted. It is respectfully suggested that such provisions relate to a *controlled result* but not *control of the work done to obtain such result.*

To support its decision that joint control existed the Court holds that the geologist, whose only duty was to collect samples, controlled the work being done. The geologist was never at the job site until the morning of the occurrence and work had not even started at that time. It is our position that a fair interpretation of the evidence showed the geologist had no authority over the work being done. The Court in its decision states: "True, these occasions were after the accident happened, but the geologist was at the site when the accident happened and *there is no showing that his authority was any less before the accident than it was after.*" (Emphasis ours.) The burden was on the plaintiff to show the authority of the geologist over the work, if any existed; there was no evidence showing authority of the geologist prior to that time and yet the Court uses the failure of the plaintiff to show such authority

as a basis for sustaining the position of the plaintiff in this case.

We again refer to the decisions cited in the brief of appellant construing contracts similar to the "farm-out" agreement involved in this case. The Court has apparently ignored those decisions and has based its decision upon an extension of the joint venture definition to a factual situation which is weaker than any factual situation involved in cases cited by the Court in supporting its decision. The decision of this Court jeopardizes the relationship of parties under any contract involving a controlled contract result. It is our thought that perhaps the Court did not contemplate the chaos and uncertainty which its decision will and has caused in the oil and gas industry within the Ninth Circuit area. Under this decision "farm-out" oil and gas well drilling contracts are ended as independent contracts.

III

The Court has not fully considered the fact that appellant had no rights in the lease on the property where the drilling was being done at the time of the accident. The date of the accident was June 1, 1954. The Government lease on this land expired for non-payment of rent February 1, 1954. The appellant had no legal rights in this lease until ten days after the accident happened when the Rocky Mountain Company agreed its new lease on the property would be subject to the contract with Shell. It is urged that this fact did not retroactively make Shell liable for

the negligence of Rocky Mountain Oil Company occurring prior to such reinstatement.

It is upon the above stated grounds and those heretofore presented to the Court that appellant urges this Court to grant a rehearing and re-examine the issues involved in this case.

Respectfully submitted,

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BLAINE F. EVANS
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By Claude V. Marcus
625 First National Bank Bldg.,
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Attorneys for Appelllant and Petitioner

STATE OF IDAHO)
COUNTY OF ADA) ss.

CLAUDE V. MARCUS being first duly sworn on oath certifies and says:

That he is one of the attorneys for appellant in this cause; that he makes this certificate in compliance with Rule 23 of the Rules of the United States Court of Appeals for the Ninth Circuit; that, in his judgment, the within and foregoing Petition for Rehearing is well founded and is in no way interposed for the purpose of delay.

Claude V. Marcus

SUBSCRIBED and SWORN to before me at Boise, Idaho this 3rd day of December, 1957.

Harry A. Kessler
Notary Public for Idaho
Residing at Boise, Idaho.